APPENDIX A

Filed July 6, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7395, 92-7396, 92-7397, 92-7398, 92-7399
92-7400, 92-7410, 92-7411, 92-7412, 92-7413, 92-7414
92-7415, 92-7435, 92-7436, 92-7499, 92-7500

IN RE: COLUMBIA GAS SYSTEMS INC.,
COLUMBIA GAS TRANSMISSION CORPORATION

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION,
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP ("the Partnership")
AND ITS SUBSIDIARY, OZARK FINANCE CORPORATION
(the "Company"),
Intervenors in support of Appellants

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and
COLUMBIA GAS TRANSMISSION CORPORATION
("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7395

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS SYSTEMS INC.

v.

UNSECURED CREDITORS COMMITTEE
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEMS, INC. ("CG") and
COLUMBIA GAS TRANSMISSION CORPORATION
("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7396

(D.C. Civil No. 92-00235)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.
THOMAS E. ROSS,
Trustee

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE");
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7397

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION, the MARYLAND PUBLIC SERVICE COMMISSION, The PUBLIC UTILITIES COMMISSION OF OHIO and the MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7398

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS, INC.; MARYLAND OFFICE/PEOPLE'S COUNSEL

v.

COLUMBIA GAS SYSTEMS, INC.; COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTIONS INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATURAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS TRANSMISSION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFCE OF PEOPLE'S COUNSEL,
Appellants No. 92-7399

(D.C. Civil No. 92-00242)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
PUBLIC UTILITIES COMMISSION/OHIO

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY, OZARK FINANCE CORPORATION
(the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor, in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7400

(D.C. Civil No. 92-00243)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE NATURAL GAS COMPANY
("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC.,
Appellants No. 92-7410

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
WEST OHIO GAS CO.;
VIRGINIA NATURAL GAS, INC.;
PEOPLES NATURAL GAS COMPANY,
Appellants No. 92-7411

(D.C. Civil No. 92-00238)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION ("TCo"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7412

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
OFFICIAL COMMITTEE/CUSTOMERS

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE ON UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellant
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7413

(D.C. Civil No. 92-00236)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNCIL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("Tco"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO;
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS OF KENTUCKY,
COLUMBIA GAS OF MARYLAND,
COLUMBIA GAS OF OHIO,
COLUMBIA GAS OF PENNSYLVANIA, AND
COMMONWEALTH GAS SERVICES, collectively
known as the COLUMBIA GAS DISTRIBUTION COMPANIES,
Appellants No. 92-7414

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Appellants No. 92-7415

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.,
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7435

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7436

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7499

OZARK GAS TRANSMISSION SYSTEM; OZARK FIN. CORP.,
Appellants No. 92-7499

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEM, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7500

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION, INC.
Intervenor-Appellee
(per Court order dated
11/6/92)

On Appeal from the United States District Court
for the District of Delaware

(D.C. Civil Nos. 92-00127, 92-00235, 92-00236,
92-00238, 92-00239, 92-00240, 92-00241, 92-00242,
92-00243)

Argued: April 1, 1993

BEFORE: SLOVITER, *Chief Judge*, COWEN and
NYGAARD, *Circuit Judges*
(Filed July 6, 1993)

OPINION OF THE COURT

COWEN, *Circuit Judge.*

Columbia Gas Transmission Corporation ("Columbia"), an owner of a natural gas pipeline, filed a bankruptcy petition and moved for court permission to pay certain pre-petition obligations, including: (1) refunds collected from upstream suppliers and owed to Columbia's customers; (2) research surcharges collected from customers and owed to a nonprofit industry research institute; and (3) bills for purchases of natural gas from upstream suppliers. The district court held that all of these funds are property of the bankruptcy estate, and therefore may not be distributed to select creditors. Columbia asserts that since it holds these funds in trust, the money it seeks to distribute to satisfy these obligations is not property of its bankruptcy estate.

Federal common law, rather than state law, governs the inquiry whether Columbia holds these monies in trust. Applying federal common law, we conclude that Columbia holds the customer refunds and research surcharges in trust, but the obligations to upstream suppliers are ordinary unsecured debt. Accordingly, we will reverse in part and affirm in part the order of the district court, and remand for further proceedings consistent with this opinion.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

Columbia purchases natural gas from upstream pipeline suppliers, transports this gas in interstate commerce, and resells it to local distribution companies. The local distribution companies, about half of which are affiliates of Columbia, then sell this natural gas to the ultimate users, the gas-consuming public. Columbia transports natural gas through 18,900 miles of pipeline to thirteen

Northeastern, Middle Atlantic, Midwestern and Southern states, as well as to the District of Columbia. Together with its affiliates, Columbia operates one of the largest natural gas systems in the country. As such, its operations are extensively regulated by the Federal Energy Regulatory Commission ("FERC" or "Commission") pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1988 & Supp. III 1991). Among other things, FERC ensures that the rates gas companies charge are just and reasonable. *See id.* § 717c(a).

On July 31, 1991, Columbia and its parent corporation, The Columbia Gas System, Inc., filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (1988 & Supp. III 1991), in the United States Bankruptcy Court for the District of Delaware. Columbia continued to operate as a debtor in possession. *See* 11 U.S.C. §§ 1107, 1108. On August 23, 1991, Columbia filed a motion (the "FERC motion") requesting authority to pay certain pre-petition obligations in order to comply with its FERC tariff orders. Specifically, Columbia sought: (1) to refund to its customers amounts refunded to it by upstream pipelines that previously had overcharged it for gas and transportation services; (2) to pay surcharges collected from customers and owed to the Gas Research Institute ("GRI"); and (3) to pay bills for pre-petition purchases of natural gas supplies and transportation services from upstream pipelines.

A. *Overview of the Federal Regulatory Scheme*

Interstate natural gas pipelines are subject to extensive federal regulation under the Natural Gas Act, and FERC regulations and orders. Natural gas companies initially set their own rates and other terms for the transportation or sale of gas, typically by contract with their customers. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341, 76 S. Ct. 373, 379 (1956). All rates,

however, must be "just and reasonable" or they are unlawful. 15 U.S.C. § 717c(a).[1]

FERC, not the courts, initially decides whether rates are reasonable. *See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 71 S. Ct. 692, 695 (1951). Therefore, natural gas companies must file with FERC all proposed rates and contracts for the sale or transportation of gas, *see* 15 U.S.C. § 717c(c), and may not change a filed rate or contract without providing FERC with thirty days notice, *see id.* § 717c(d). The Commission may modify or reject any proposed rate or contractual term that fails to comply with the Natural Gas Act. *See id.* § 717d(a).

When a pipeline files a proposed rate change, FERC must issue an order within thirty days approving or invalidating the new rate. The Commission also has authority to preserve the status quo pending its review of a newly filed rate by suspending the effectiveness of the proposed rate for up to five months. *See id.* § 717c(e). If FERC suspends a rate that takes effect after five months, the new rate becomes effective subject to refund if FERC later declares the rate unreasonable. *See id.* § 717c(e). Refunds are retroactive to the date the new rate took effect and include interest from the date of collection at a rate based on the prime rate. *See* 18 C.F.R. § 154.67 (c)(2)(iii) (1992).

FERC's power is not limited to reviewing changes in rate and contractual terms; it also may review existing rates and practices of natural gas companies. If the Commission finds that any rate, contract or practice of a

---

[1] Section 717c(a) provides:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

gas company is unjust, unreasonable, unduly discriminatory or preferential, it may determine the reasonable rate, contract term or practice and order the offending company to comply with its determination. *See* 15 U.S.C. § 717d(a). The Commission may not, however, impose a rate retroactively if it finds that a previously approved rate is unjust or unreasonable. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S. Ct. 2925, 2930 (1981); *see also* 15 U.S.C. § 717d(a). Instead, FERC may adjust for past unreasonably high or low charges when it sets future rates.

The provisions of the NGA outlined above give rise to the "filed rate doctrine." Under that doctrine, a reasonable rate is that which FERC fixes, subject only to deferential judicial review. *See Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 371, 108 S. Ct. 2428, 2439 (1988). Once the reasonable rate is determined, gas companies may not collect any other rate. *See Arkansas Louisiana Gas Co.*, 453 U.S. at 578, 101 S. Ct. at 931.

B. *Background of Columbia's Claims*

Because of the shortage of natural gas in the late 1970s and early 1980s, many pipeline owners, including Columbia, entered into long-term contracts with natural gas producers containing take-or-pay clauses. A take-or-pay clause obligates a pipeline to purchase a certain amount of gas at a specified price. The pipeline agrees to pay for a set quantity of gas even if it actually takes less. By 1987, an oversupply of natural gas significantly decreased market prices, and pipeline customers had little incentive to purchase gas from pipelines at prices sufficient to allow the pipelines to cover the cost of gas they agreed to pay in their take-or-pay contracts. As a result, pipelines' gas sales declined, and the pipelines faced billions of dollars in accrued and future take-or-pay liability.

In response to this crisis, FERC allowed pipelines to buydown or buyout their contracts with producers. In a

buydown, a pipeline pays to reform the contract. In a buyout, a pipeline pays a supplier to terminate the contract. To alleviate the pipelines' financial hardship, FERC issued Order 500, an interim rule, which required producers, pipelines and pipeline customers to equitably share the costs associated with buydowns and buyouts. *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* 52 Fed. Reg. 30,334 (1987) ("Order 500"). In short, Order 500 provided that if a pipeline agreed to absorb twenty-five to fifty percent of its settlement costs to buydown or buyout its high-cost contracts, the pipeline could pass through an equal portion to its customers through fixed charges. Order 500 permitted pipelines to utilize the purchase deficiency method to allocate these fixed charges among its customers. The purchase deficiency method assigned a customer a share of the buyout or buydown costs in proportion to the decline in that customer's gas purchase. Pursuant to Order No. 500, Columbia filed a tariff with FERC to recover its buyout costs from its customers.

The Court of Appeals for the District of Columbia Circuit struck down the purchase deficiency allocation method because it violated the filed rate doctrine of the NGA by imposing a retroactive rate increase for gas sold in the past. *See Associated Gas Distribs. v. FERC,* 893 F.2d 349, 355 (D.C. Cir. 1989), *cert. denied,* 498 U.S. 907, 111 S. Ct. 277 (1990). After this decision, FERC issued Order No. 528, which required pipelines to file new tariffs that allocated the fixed charges pursuant to a different formula. *See Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs—Order No. 528,* 53 FERC (CCH) ¶ 61,163, at 61,594-95 (1990) ("Order 528"). Order 528 also required the suppliers to refund the amounts customers had been overcharged under the purchase deficiency formula. *Id.* at 61,595-96.

Pursuant to Order 528, five upstream pipelines that supplied gas to Columbia filed new rate schedules which allocated $134 million less in buyout or buydown costs to

Columbia than under the purchase deficiency method. Columbia, in turn, filed tariff provisions with FERC to flow through these refunds to its downstream customers. These refunds, together with approximately $26 million in refunds arising from other overcharges for gas transportation services, comprise the customer refunds that Columbia seeks to exclude from its bankruptcy estate and pay to its customers. At the time it filed for bankruptcy, Columbia already had received only $21 million in refunds from the upstream pipelines and expected to receive $140 million in the future.

Columbia maintained its financial records in accordance with the Uniform System of Accounts promulgated by FERC. *See* 18 C.F.R. Pt. 201 (1992). When Columbia received a refund, it recorded an increase to its assets and a corresponding liability to the appropriate customers. It did not pay income tax on refunds unless it failed to forward the money to its customers within eight and a half months. Columbia tracked the various refunds through separate paper accounts. These accounts are not actual money accounts, but informational mechanisms for accomplishing the complicated task of tracking its refund obligations. Accounts were created based on the source of the refund, the legal reason for the refund, the time period to which the refund relates, and the designated downstream recipient. This process required Columbia to maintain approximately one hundred separate refund accounts.

Columbia received refunds from upstream suppliers in the form of checks, wire transfers and billing credits, and passed refunds through to its customers through all of these devices. Columbia paid interest to its customers at a statutorily prescribed rate for the time it retained the customer refunds. *See* 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c)(2).

Although it meticulously tracked refunds on paper, Columbia did not maintain separate bank accounts for the

different refunds. It employed a combined cash management system and utilized all of its cash without restriction. At the end of every day, excess cash was either invested or used to repay short-term debt to its parent. Therefore, when it filed its bankruptcy petition, Columbia had only $3.3 million in cash. This pooling of funds promoted efficient utilization of cash resources.

The second category of payments Columbia sought to make was $1.8 million in surcharges owed to GRI. GRI is a non-profit organization which manages research and development projects related to natural gas production and transportation. It does not provide any services directly to Columbia. GRI is financed predominantly through FERC-approved surcharges on gas delivered through regulated pipelines. Pursuant to this regulatory mechanism, each pipeline, including Columbia, collects a separately identified charge from its customers and then remits this money to GRI within fifteen days. *See Gas Research Institute—Opinion No. 226,* 28 FERC (CCH) ¶ 61.386, at 61.705 (1984). The Commission's accounting rules require that monies collected on behalf of GRI be tracked in a separate account. *See* 18 C.F.R. Pt. 201, § 188.

In its FERC motion, Columbia also sought to pay upstream suppliers $15.3 million for gas delivered and transportation services provided to it in the two months prior to its filing for bankruptcy.

C. *Decisions of the Bankruptcy and District Courts*

Columbia argued to the bankruptcy court that the funds earmarked for customer refunds, GRI charges and upstream suppliers' bills are not property of its bankruptcy estate because these funds are held in trust for its customers, GRI and upstream suppliers respectively. The Customers Committee and several local distribution companies supported Columbia's position, while the Unsecured

Creditors Committee and other individual unsecured creditors opposed it.

A bankruptcy estate includes all property of the debtor, but only to the extent of the debtor's equitable interest in such property. *See* 11 U.S.C. § 541(d) (1988). Therefore, if Columbia possessed only legal title to the monies at issue, these funds would not be an asset of the bankruptcy estate, and could be distributed.

The bankruptcy court first held that federal common law controlled whether Columbia had an equitable interest in the funds. Applying federal common law, the bankruptcy court found that the refunds Columbia received under FERC orders, as well as the GRI surcharges, are held in trust for its customers and GRI. Thus, Columbia has no equitable interest in these payments. The bankruptcy court attached minimal significance to Columbia's commingling of the trust funds with general revenues because of the economic inefficiency of establishing numerous separate cash accounts.

Because the commingling precluded specifically tracing the trust funds, however, the bankruptcy court endorsed the lowest intermediate balance test. This principle assumes that money held in trust is withdrawn last from a commingled account. Once trust money is withdrawn, however, it is not replenished by subsequent deposits. Therefore, a beneficiary is entitled only to the lowest intermediate cash balance in a commingled account. To satisfy the obligations arising from customer refunds and GRI charges that Columbia received pre-petition, the bankruptcy court held that Columbia could distribute only the $3.3 million in cash it had when it filed for bankruptcy. The remaining pre-petition obligations would be unsecured debt. The bankruptcy court also found that Columbia could flow through to its customers and GRI all refunds and surcharges received post-petition.

The bankruptcy court denied Columbia's request to pay upstream pipelines. The bankruptcy court distinguished these payments from the customers refunds and GRI charges in two respects: (1) the upstream payments were for goods and services; and (2) Columbia sought to distribute funds that it had not already collected from customers, but that it would recover in the future. The bankruptcy court also held that payments to the upstream pipelines were not necessary for a successful reorganization under 11 U.S.C. § 105(a) (1988).[2]

The district court reversed the disposition of the customer refunds and GRI payments, but affirmed the bankruptcy court's decision with respect to the upstream pipeline payments. As a threshold matter, the district court held that state law controlled the treatment of the refunds and other monies. The district court examined the contracts between Columbia and its customers to discover whether the parties manifested the requisite intent to create an express trust and found that they had not. The district court also found Columbia's commingling of the funds and the statutory requirement that interest be paid to be indicia of a debtor-creditor, rather than a trustee-beneficiary relationship. The district court stated that even if federal common law controlled, the result would be the same.

The district court also rejected the theory that because Columbia was a mere conduit for the funds to reach the customers, it held the money in constructive trust for its customers. The court found the state law requirement of wrongful conduct absent in this case. It also found no identifiable trust property due to the commingling of funds. The district court agreed with the reasoning and

---

[2] The bankruptcy court also found that the customer refunds and GRI surcharges precluded from immediate distribution by operation of the lowest intermediate balance test were not necessary to rehabilitate Columbia. No party appeals this decision.

conclusions of the bankruptcy court concerning the obligations owed to upstream suppliers.

Fourteen parties appealed the ruling of the district court. Additionally, FERC submitted an *amicus curiae* brief expressing its view that the customer refunds and the GRI surcharges are held in trust.

II. *CUSTOMER REFUNDS*

The principal issue on appeal is whether the customer refunds Columbia receives from upstream suppliers and passes on to its customers are property of Columbia's bankruptcy estate as defined in 11 U.S.C. § 541(d). This inquiry turns on whether Columbia holds the refunds in trust for its customers. *See infra* part II.B. Before addressing the merits of this issue, however, we must determine whether this question should be resolved under federal common law or state law. We exercise plenary review over this legal question. *See United States v. Med O Farm, Inc.*, 701 F.2d 88, 89 (9th Cir. 1983); *cf. Armotek Indus., Inc. v. Employers Ins. of Wasau*, 952 F.2d 756, 760 n.5 (3d Cir. 1991) (which state's law controls is a legal question subject to plenary review).

A.

It is axiomatic that federal law governs questions involving the interpretation of a federal statute. *See Kamen v. Kemper Fin. Services*, —— U.S. ——, 111 S.Ct. 1711, 1717 (1991). Therefore, it is clear, and the parties do not dispute, that federal law defines the parameters of section 541(d) of the Bankruptcy Code. This, however, is only the beginning of the inquiry. The deterination that federal law applies does not inevitably require the application of a uniform federal rule. Applying federal law, courts may either fashion a uniform federal common law rule or adopt state law as the federal rule of decision.

See id.; United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28, 99 S. Ct. 1448, 1458 (1979).

In *Kimbell Foods,* the Supreme Court outlined the analysis that determines whether uniform federal common law or state law should apply. The determination depends on the nature and importance of the government interest at issue and the effect of applying state law. *Kimbell Foods,* 440 U.S. at 727-28, 99 S. Ct. at 1458. To decide whether a national federal rule is necessary, courts should consider: (1) the need for a nationally uniform law; (2) whether incorporation of state law would frustrate specific objectives of the federal program at issue; and (3) the extent to which application of a federal common law rule would upset commercial expectations that state law would govern. *See id* at 728-29, 99 S. Ct. at 1458-59; *Adams v. Madison Realty & Dev. Inc.*, 937 F.2d 845, 856 (3d Cir. 1991). Developing a federal common law rule is the exception rather than the rule. Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards. *See Kimbell Foods,* 440 U.S. at 728, 99 S. Ct. at 1458.

Whether the customer refunds are held in trust for Columbia's customers, and therefore excluded from the bankruptcy estate, sufficiently implicates important federal interests to warrant the application of federal common law. First, a national uniform law is necessary. The refunds at issue are created by an order of FERC. Their purpose is to compensate customers who have been charged excessive rates for natural gas. Private parties may not alter the refund orders by contract or otherwise. Indeed, the very purpose of the NGA is to supersede private contractual arrangements that interfere with the federal objective of ensuring that pipelines charge only reasonable rates. Because the refunds arise directly from federal law and implement the central objective of the NGA, the property

rights Columbia has in these customer refunds should not be subject to the vagaries of state trust law. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310, 108 S. Ct. 1145, 1156 (1988) (("[U]niformity of regulation . . . was an objective of the Natural Gas Act.") (quoting *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 91-92, 83 S. Ct. 646, 651 (1963)).

Second, applying state law to determine Columbia's property rights in the refunds would frustrate the NGA's central purpose, to provide natural gas to the public at reasonable rates. *See generally FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612, 64 S. Ct. 281, 292 (1944) NGA is "plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies"). Trust law in numerous states imposes a constructive trust on funds only if wrongdoing has resulted in unjust enrichment. *See, e.g., Suttles v. Vogel*, 533 N.E. 2d 901, 905 (Ill. 1988); *Roper v. Edwards*, 373 S.E.2d 423, 424-25 (N.C. 1988); *Adams v. Jankouskas*, 452 A.2d 148, 152 (Del. 1982). Absent an express trust or affirmative wrongdoing, state law would not hold the refunds in trust on behalf of Columbia's customers. Federal common law, however, provides a more expansive definition of an implied trust. Federal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient. *See In re Penn Central Transp. Co.*, 486 F.2d 519, 523-27 (3d Cir. 1973) (in banc), *cert. denied*, 415 U.S. 990, 94 S. Ct. 1588 (1974).

The Court of Appeals for the District of Columbia Circuit held that the pipelines overcharged the gas-consuming public. *See Associated Gas Distrib.*, 893 F.2d at 355. To remedy this violation of the NGA, FERC ordered refunds to be paid by upstream suppliers to Columbia and further ordered Columbia to flow through these refunds to its customers and eventually to the public. If FERC intended

that Columbia act as a conduit for the refunds to reach the public, but state law would not create a trust, FERC's objective of ensuring the exploited customers to receive the full amount of their refunds would be subverted by state law. Application of the federal common law rule is necessary to prevent such an outcome. Because the disposition of the refunds has the potential to enforce or undermine the dictates of a federal regulatory scheme, it is an issue "distinctively federal in character," warranting application of federal common law. *See United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S. Ct. 1604, 1607 (1947) (federal common law controls creation of liability for interference with government-soldier relationship); *see also D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 455-56, 62 S. Ct. 676, 678-79 (1942) (federal common law governs enforceability of promissory notes held by the Resolution Trust Corporation).

Application of state law not only would frustrate the purpose of the NGA, but also would warp the definition Congress intended to provide to the exclusion from the bankruptcy estate for equitable interests. *See* 11 U.S.C. § 541(d). The legislative history of section 541(d) makes clear that when a debtor collects money on behalf of another, this money is held in constructive trust for the intended eventual recipient even absent any misconduct. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324.[3] Since in some cases state law is inconsistent with this definition, it must be displaced.

Finally, applying federal common law will not upset commercial expectations that state law would govern. Creditors cannot reasonably assume that state law will allocate various parties' interests in federally created property rights. Moreover, this court already has developed federal common law concerning trusts. *See Penn Central*,

[3] *See infra* typescript at 60.

486 F.2d at 523-25. Therefore, our decision to apply federal common law will not require us to announce new doctrines of substantive law unforeseen by the parties.

In *In re Lehigh & New England Railway Co.*, 567 F.2d 570 (3d Cir. 1981), this court applied federal common law to a factually similar case. There, shippers paid a single railway, which transported a shipment over tracks owned by numerous railroads. The compensated railroad maintained interline accounts to track the amounts it owed to other railways for use of their tracks, and settled these accounts at the end of each month. When a railway went into receivership, the railroads that were owed interline payments sought to be paid from the debtor's mortgaged assets prior to both the secured and unsecured creditors, claiming that the money owed was held in trust for their benefit.

This court held that federal common law governed the disposition of the interline revenues. *See Lehigh*, 657 F.2d at 575-76. Several circumstances informed our decision. First, the interline funds arose from railroad operations, which are under the exclusive control of Congress. *Id.* at 575. Second, Congress, had enacted comprehensive legislation, the Interstate Commerce Act, evidencing its intent to ensure the coordination of interline rail transportation. *Id.* Third, Congress regulated the rates charged by railroads through a federal agency, the Interstate Commerce Commission. *Id.* Finally, we observed that uniformity in the method of balancing interline accounts was necessary to allow our nation's railways to operate as an integrated network. *Id.* Based on these four factors, this court concluded that the distribution of interline payments "implicate[s] wholly national concerns and therefore should be governed by federal law." *Id.* at 576.

The same rationale applies here. The customer refunds arose from the sale of natural gas, which is regulated by Congress. Congress has enacted comprehensive legislation,

the NGA, to regulate the gas industry, and it created a federal agency, FERC, to interpret and enforce this regulatory scheme. There is an even greater federal interest in this case than in *Lehigh*. The intricate system of accounts pipelines maintain to track refunds, the backbone of the federal scheme to regulate the gas industry, is mandated by federal law. *See* 18 C.F.R. Pt. 201, § 496 (1992). In contrast, the railroads in *Lehigh* voluntarily adopted the interline balance system.

The district court distinguished *Lehigh* because it found that regulation of the railroad industry was significantly more pervasive than regulation of the gas industry. The district court based this conclusion primarily on the fact that gas suppliers negotiate individualized rates with distributors while the Interstate Commerce Commission, at the time *Lehigh* was decided, set nationwide railroad rates and effectively precluded private contracts from establishing rates. *See United Gas Pipe Line Co., v. Mobile Gas. Serv. Corp.*, 350 U.S. 332, 338-39, 76 S. Ct. 373, 378 (1956); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 109-10, 79 S. Ct. 194, 198 (1958).[4] The district court, however, ignored the rationale underlying these different procedures.

The NGA and the Interstate Commerce Act contain almost identical language about the legally permissible rates gas pipelines and railways respectively may charge.

---

[4] The district court highlighted the special importance of railroads in our economy by noting the swift action taken by Congress and the President to avert a national railroad strike that threatened to paralyze the economy. *See* Settlement of the Railroad Labor-Management Disputes. Pub. L. No. 102-306, 106 Stat. 260 (1992). We have no reason to believe that Congress and the President would not be similarly concerned if a natural gas strike threatened to halt the supply of natural gas to residents and businesses throughout the nation. Therefore, we do not find this evidence probative of the relative extent of the federal interest in the two industries.

Compare 15 U.S.C. § 717c(a) (gas company rates "shall be just and reasonable") *with* 49 U.S.C.A. § 1004(a) (1963) (repealed 1978) (railroads may charge only "just and reasonable rates").[5] Although Congress utilized varying methods in the two industries to ensure that consumers are not overcharged, Congress did not thereby intend to regulate either the railroad or gas industry more stringently. The Supreme Court explained that Congress abrogated contractually negotiated rates in the railroad industry for reasons of administrative convenience:

> The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act . . . . [Therefore,] the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts . . . .

Mobile Gas, 350 U.S. at 338-39, 76 S. Ct. at 378. Moreover, FERC's ability to regulate gas rates is not in any way limited by the existence of private contracts since all contracts are "subject of course to any overriding authority of the Commission." *Memphis Light,* 358 U.S. at 114, 79 S. Ct. at 200. We therefore find no persuasive basis to distinguish *Lehigh* from this case.

Our decision to apply the federal common law of trusts is consistent with *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* 962 F.2d 1192 (6th Cir.), *cert. denied,* —— U.S. ——, 113 S. Ct. 659

[5] Although the Customers Committee notes that regulation of railroads has changed significantly since *Lehigh,* the regulation in effect at the time this court decided *Lehigh* is relevant.

(1992), upon which the Committee of Unsecured Creditors heavily relies. In that case, a gas pipeline appropriated an exclusive underground natural gas storage easement beneath private property pursuant to its eminent domain authority under the NGA. The NGA required the pipeline to compensate the landowners. The *Exclusive Natural Gas court* declined to create federal common law to calculate the value of the land. 962 F.2d at 1195-99. Instead, it held that the standard of valuation should incorporate the law of the state in which the condemned property is located. *Id.*

Exclusive Natural Gas does not stand for the broad proposition, as the Committee of the Unsecured Creditors contends, that reference to state law doctrines to interpret sections of the NGA will not frustrate the goals of that statute. Rather, *Exclusive Natural Gas* addressed a specific section of the NGA, 15 U.S.C. § 717f(h). Section 717 (h), which governs the right of eminent domain, expressly provides that "[t]he practice and procedure in any [eminent domain] action or proceeding . . . shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." Because the statutory language explicitly instructed federal courts to look to state "practice and procedure," the court read the section "as raising a strong presumption" that state substantive law is also applicable. *Exclusive Natural Gas,* 962 F.2d at 1197. In contrast, neither the NGA nor the FERC order which creates the customer refunds mention application of state law. Therefore, no "strong presumption" in favor of state law exists in this case.

Additionally, the *Exclusive Natural Gas* court found that using state law valuation rules would not undercut the objectives of the NGA because the effect of the state law rule would be minimal. All parties agreed that the condemners had to pay for the easement they appropriated;

the only disputed issue was how to calculate the value of this easement. The court found that any variance between a conceivable federal common law rule and the state law rule was too small and too speculative to rise to the level of frustrating the NGA. *Id.* at 1198. In this case, the parties disagree on who equitably owns the customer refunds. Columbia or its customers as the beneficiaries of a trust. This dispute does not implicate an ancillary issue of valuation, but determines whether or not many millions of dollars become part of Columbia's bankruptcy estate. For all of these reasons, *Exclusive Natural Gas* is easily distinguishable from the present case.

B.

Having determined that federal common law governs whether the customer refunds are property of Columbia's bankruptcy estate, we turn to the merits of that issue.[6] Applying federal common law, the bankruptcy court found that Columbia held these refunds in trust for its customers, and therefore excluded them from the bankruptcy estate. This holding was a legal conclusion, but was predicated on many factual findings. We exercise the same review over the bankruptcy court's order as the district court. *See Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988). We accept the bankruptcy court's factual findings unless they are clearly erroneous, but conduct a plenary review of the ultimate legal con-

[6] The Committee of Unsecured Creditors devotes a significant portion of its brief to arguing that (1) the NGA does not modify the priority scheme of the Bankruptcy Code, which is based on equality of distribution for all creditors; and (2) no universal priority in favor of statutory schemes exists. *See* Committee of Unsecured Creditors Brief at 20-25. By so framing the issue, the Creditors Committee overlooks the dispositive question. The issue before us is whether the refunds are property of the bankruptcy estate. If the refunds are excluded from the bankruptcy estate, the priority scheme is not implicated because it only controls how to divide assets contained in the bankruptcy estate.

clusion. *See Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

The Bankruptcy Code provides that "all legal or equitable interests of the debtor" become property of the bankruptcy estate. *See* 11 U.S.C. § 541(a)(1). Courts have construed this definition broadly to include interests in causes of action, *see, e.g., Esselen Assoc. v. Cryen/Montenay Energy Co.*, 102 B.R. 25, 28 (S.D.N.Y. 1989), *aff'd in relevant part and rev'd in part*, 902 F.2d 1098 (2d Cir. 1990); *Amazing Enters. v. Jobin (In re M & L Business Mach. Co.)*, 136 B.R. 271, 275 (Bankr. D. Colo. 1992), and common carrier certificates, *see, e.g., Bernstein v. R.C. Williams, Inc. (In re Rocky Mountain Trucking Co.)*, 47 B.R. 1020, 1021 (D. Colo. 1985); *In re Brown Transp. Truckload, Inc.*, 118 B.R. 889, 893 (Bankr. N.D. Ga. 1990). The Bankruptcy Code, however, exempts specific interests from a debtor's estate. For example, section 541(d) provides:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

All parties agree that trustee has no equitable interest in funds it holds in trust. Indeed, that is the classic definition of a trust—the beneficiary has an equitable interest in the trust property while legal title is vested in the trustee. *See* Restatement (Second) of Trusts § 2 cmt. f (1959); 1 A. W. Scott & W.F. Fratcher, *The Laws of Trusts* § 12.2 (4th ed. 1989). Therefore, if Columbia holds the customer refunds in trust, as it asserts, these refunds are excluded from Columbia's bankruptcy estate and are immediately payable to its customers.

Congress clearly intended the exclusion created by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust [7]:

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance and the insurance company had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, *the payment would actually be held in constructive trust for the person to whom the bill was owed.*

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 (emphasis added). This insurance example evidences that Congress intended that when a debtor is a mere conduit for funds to travel from one party to another, it lacks an equitable interest in the monies. *See T & B Scottdale Contractors, Inc. v. United States,* 866 F.2d 1372, 1376 (11th Cir.) ("[t]he legislative history of 11 U.S.C.A. § 541 makes it clear that funds in debtor's possession held for a third-party do not become part of the estate in bankruptcy"), *cert. denied*, 493 U.S. 486, 110 S. Ct. 139 (1989).

Applying federal common law, this court previously has imposed an implied trust on funds held by a bankrupt debtor for another entity. *See In re Penn Central Transp. Co.*, 486 F.2d 519, 523-27 (3d Cir. 1973) (in banc), *cert. denied*, 415 U.S. 990, 94 S. Ct. 1588 (1974).[8] In *Penn Central*, railroads that shipped goods traveled over

---

[7] We do not reach the question whether section 541(d) excludes any interest other than funds held in trust.

[8] *Penn Central* is a pre-Bankruptcy Code decision, but its analysis of whether the interline balances were held in trust is identical to the inquiry the Code requires.

railroad tracks owned by many different railways. To facilitate operations, the shipping railroad collected the entire charge from the customer, a portion of which it owed to the other railways whose tracks had been utilized. The railroad industry voluntarily created a complex system of accounting for these interline revenues and settled the balances in each interline account monthly.

Penn Central held that a trust relationship exists when the parties manifest an intention to create a trust. *Id.* at 524. The parties, however, need not employ any talismanic language—"failure to expressly designate the relationship as one of trust does not necessarily negate its existence." *Id.*[9] Absent a document definitively establishing a trust relationship, we look to the language of the parties, their conduct, and other circumstances surrounding the transaction probative of their intent. *See id.* at 524-27.

The *Penn Central* court found that "the collecting railroad serves merely as a receiving and transmitting agent" as to the money it receives for the use of other railways' tracks. *Id.* at 523-24. Therefore, we held, the "freight charges, *when collected*, are held in trust." *Id.* at 524 (emphasis in original). We found significant that the interline balances did not represent payments by one railroad to another for services rendered. *See id.* at 528. The railroads owed one another money simply because they had collected fees on another's behalf.

---

[9] The Committee of Unsecured Creditors emphasizes that Congress knows how to create a trust relationship. *See, e.g.*, 7 U.S.C. § 499e(c)(2) (1988) ("[p]erishable agricultural commodities received by a . . . broker . . . shall be held by such . . . broker in trust for the benefit of all unpaid suppliers"); 26 U.S.C. § 7501(a) (1988) (federal taxes withheld by employers are "held to be a special fund in trust for the United States"). Although our task would be much easier if the NGA explicitly stated that refunds are held in trust for overcharged customers the absence of such express language is the beginning, not the end, of our inquiry. *See Penn Central*, 486 F.2d at 524.

Another indicia of a trust emphasized in *Penn Central* was the absence of any provision for the payment of interest. *Id.* at 524. One party permitting another to use its money for a period of time in exchange for the payment of interest is the hallmark of a debtor-creditor relationship. Therefore, the absence of interest payments of interline balances counseled in favor of finding a trust.

Usually, the commingling of trust funds with general revenues also indicates a debtor-creditor relationship. The *Penn Central* court found, however, that the "[c]ommingling of monies has minimal significance in the extraordinary operations of interline railroads." *Id.* at 525. Because it would be highly inefficient to segregate the numerous collections railroads received, little weight was accorded to this factor.

The *Penn Central* court found the trust principles it applied "appropriate to any industry," *see id.* at 527 we now apply them to the facts of this case. Before examining the extent of Columbia's interest in the refunds, we must discuss how this interest is created. Typically, trust and debtor-creditor relationships are created by contractual agreement between two parties. Here, however, the refunds and the mechanism to distribute them were created by FERC, pursuant to its statutory authority under the NGA. Neither Columbia nor its customers could alter their respective interests in the refunds by contract. Because FERC unilaterally created the refunds, our characterization of the debtor's interest in these refunds turns on the manifestations of FERC's intent.[10]

FERC ordered Columbia to collect refunds from upstream suppliers and flow through these monies to its cus-

---

[10] The district court erroneously concentrated on the contracts between Columbia and its customers. The district court stated: "The contracts explicitly detail the terms of billing and payments, yet significantly include no indication of a trust relationship. . . . [T]he refunds are based directly on these contracts." App. at 104.

tomers, local distribution companies, who in turn must flow through the funds to the gas-consuming public. *See Order 528, supra*, at 61,596 ("all refunds must be paid by upstream and downstream pipelines to the customers that actually paid the fixed charges"). When Columbia remits refunds to its customers, it is not paying them for goods or services rendered. Like the railroad in *Penn Central*, Columbia acts as a "receiving and transmitting agent," or a conduit, for money upstream suppliers owe to overcharged consumers.[11]

Columbia did not maintain separate cash accounts for the various refunds it received, it did, however, meticulously track its refund obligations by maintaining over one hundred separate paper accounts. The bankruptcy court found, and no one challenges this finding as clearly erroneous, that segregating the numerous refunds would be a huge administrative burden and economically inefficient. Therefore, as in *Penn Central*, Columbia's commingling of trust funds and general revenues has little significance concerning whether the refunds are held in trust.

To distinguish *Penn Central*, the Committee of Unsecured Creditors stresses that Columbia pays interest to its customers for the period during which it retains the refunds. Although a fixed rate of interest generally evidences a debt rather than a trust, unique circumstances make the fixed interest payments of minimal importance in this case. Interest payments indicate a debtor-creditor relationship because they are the usual contractually negotiated *quid pro quo* for a loan. Here, the NGA mandates the payment of interest, and FERC sets the interest rate.

---

[11] At oral argument, FERC asserted that although the Commission had never taken a clear position, it believed it possessed authority to order the outstanding refunds to be paid by the upstream suppliers directly to the local distribution companies. This potential ability to bypass Columbia underscores that Columbia has no equitable interest in the refunds.

See 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c)(2). Columbia's customers never consented to lend it money in exchange for a negotiated interest rate. Therefore, the payment of interest is not probative of a debtor-creditor relationship.

United Gas Pipe Line Company v. FERC, 657 F.2d 790 (5th Cir. 1981), highlights the difference between FERC-ordered refunds and loans. In that case, pipelines challenged a FERC order to pay a specific interest rate, tied to the prime rate, on refunds. The pipelines argued that the interest rate should be based on the credit terms they could obtain in a competitive market. The court refused to accept any analogy between refunds and commercial loans, explaining, "[t]here is no suggestion that energy consumers, who ultimately pay the excessive charges, would jump at the opportunity to lend money to oil companies, and, in any case they never have that choice." *United Gas*, 657 F.2d at 795.

Our conclusion that Columbia holds the customer refunds in trust is strengthened by *In re United Milk Products Co.*, 261 F. Supp. 766 (N.D. Ill. 1966). There, a federal regulatory program mandated that milk producers receive a uniform price for milk. To achieve this end, milk bottlers paid certain monies into a producer settlement fund, and manufacturers of milk products withdrew from the fund and passed this money through to their milk suppliers. United Milk, a milk product manufacturer, filed for bankruptcy and subsequently received payments from the fund, which it deposited in its general revenue bank account. The question before the court was whether this money should be deemed property of the bankruptcy estate.

The court in *United Milk* held that the fund payments were not property of the estate because the "debtor merely held them as a conduit, having an obligation to remit same to the producers." *United Milk*, 261 F. Supp. at 768. The court more fully described the function of the debtor:

> [T]he debtor has no independent right to the sums but is merely serving the function of a delivery agent, transferring money from the bottling handlers, through the Producer Settlement Fund, to the raw milk producers who are entitled to a uniform price whatever ultimate use is made of their product. . . .
>
> [T]he remaining unsecured creditors should not be permitted to share in monies in which the debtor has no direct financial interest and which it would not have been permitted to retain for its own use.

Id. Characterizing the creditors' request to include the fund payments in the debtor's bankruptcy estate as an attempt "to stop a continuing 'motion picture' at a single 'frame,'" the court "looked to the end of the reel" and directed that the money be remitted to the milk producers as directed by the original "script." *Id.*

We find the reasoning in *United Milk* persuasive and follow it here. Just as the milk funds were created to ensure that producers receive a uniform price, the refunds here were ordered to ensure that customers are charged a just and reasonable rate. Most significantly, the statutory mechanisms of paying one entity which then forwards the money to the ultimate intended beneficiary are also identical.

Conceding that "[s]uperficially, *United Milk* resolves the questions against the [Creditors'] Committee," the district court then distinguished that case. App. at 108. In *United Milk*, the government, through the Department of Agriculture, issued the check to the debtor. In this case, the money only passed through the hands of private parties.[12] This is a distinction without a difference. Co-

---

[12] The Creditors offer another distinction—that *United Milk* involves government grant money. This is simply incorrect. Although the Department of Agriculture managed the producer fund, the money was paid by private parties, the milk bottlers, and belonged not to the government but to the producers. *See United Milk*, 261 F. Supp. at 768.

lumbia's property rights in the refunds should not depend on the government's role, if any, in routing this money to the proper recipient. Otherwise, these refunds would be part of the bankruptcy estate, but if the upstream pipelines paid the refunds to FERC, which then forwarded the money to Columbia for distribution, the money would be excluded from Columbia's estate. We see no principled reason for such a distinction.

Applying federal common law, we hold that the customer refunds already received and those to be received are excluded from Columbia's bankruptcy estate under section 541(d) of the Bankruptcy Code.

III. *GRI CHARGES*

Having outlined the federal common law test to determine whether monies are held in trust, we now apply the same analysis to the GRI surcharges.[13] GRI, a non-profit organization that conducts research and development projects for the gas industry, receives the vast majority of its budget through FERC-approved surcharges on gas delivered through regulated pipelines. The procedural mechanism to collect these surcharges is very similar to the method for distributing the customer refunds. Each pipeline, including Columbia, collects a separately identified charge from its customers and then remits this money to GRI. Pursuant to federal regulations, Columbia must track monies collected on behalf of GRI in a separate paper account. See 18 C.F.R. Pt. 201, § 188. GRI does not provide any products or services directly to Columbia, and Columbia does not owe GRI money until it actually collects the charges from its customers. Columbia merely collects money from its customers on behalf of GRI.

---

[13] All parties assume that if federal common law governs the status of the customer refunds, the same body of law will determine whether the GRI charges and upstream payments are held in trust. We assume without deciding that this is true.

The argument for the GRI surcharges being held in trust is even stronger than the argument for the customer refunds being held in trust. FERC requires that GRI surcharges collected by Columbia be forwarded to GRI within fifteen days. *See Gas Research Institute—Opinion No. 226, supra,* at 61,705. Additionally, Columbia pays no interest to GRI during the short period of time it retains the money.[14] We conclude that Columbia acts as a conduit with respect to GRI surcharges, and has no equitable interest in these funds.

IV. *UPSTREAM PIPELINE PAYMENTS*

Finally, we apply the constructive trust analysis to the payments Columbia seeks to make to upstream gas suppliers and transporters for pre-petition goods and services provided. Columbia purchases natural gas from upstream pipeline suppliers, including appellants Ozark Gas Transmission System and Ozark Finance Corporation (collectively "Ozark"). It pays these suppliers based on their costs. The Transportation Cost Recovery Adjustment ("TCRA") provision of Columbia's tariff, on file with FERC, separately itemizes Columbia's costs relating to upstream pipeline charges. The rate making process allows Columbia to recover its TCRA costs on a dollar-for-dollar basis from its customers and to retain a reasonable rate of return.

The obligations owed to upstream pipelines clearly are debts. Columbia owes the upstream pipelines money for goods and services they have provided to Columbia. Although Columbia's customers pay the charges of the upstream suppliers dollar-for-dollar through Columbia's rates, the chronology of the flow of money is totally different from the customer refunds and GRI surcharges.

---

[14] Although the fact that Columbia does not pay interest on the GRI surcharges is not part of the bankruptcy or district court record, we will take judicial notice of this undisputed fact. *See* Fed. R. Evid. 201(b)(2).

The bankruptcy court found Columbia pays upstream suppliers and *subsequently* recovers its costs from its customers.[15] Since Columbia pays the upstream suppliers before it receives money from its customers, Columbia does not act as a conduit or a collecting agent for the upstream supplier.hhC The upstream pipelines are in the the same position as every other unsecured creditor.

Most retailers purchase a product from wholesalers and calculate the price at which they will resell the product to the public based on the wholesale cost plus a mark-up percentage. The fact that Columbia charges its customers based on its cost of purchasing natural gas plus a mark-up does not distinguish it from any other retailer. The upstream pipelines have supplied a product and services to a company that filed bankruptcy, and they must share the risk of bankruptcy with all other creditors.[16]

---

[15] Although Ozark did not request that the bankruptcy court reconsider this factual finding, it now contends that the finding is clearly erroneous. To support this claim, Ozark points only to the testimony of Mr. Kettering, senior vice-president of Columbia. Mr. Kettering stated that "we collect from our customers dollar for dollar for the amounts that we, *in turn*, pay to some upstream pipeline." App. at 243 (emphasis added). Although the phrase "in turn" intimates that the customers paid upstream costs before Columbia paid the upstream pipelines, Mr. Kettering was not responding to a question about the timing of the payments, and this isolated statement does not establish clear error. At oral argument, counsel for Ozark even conceded that "the testimony is not absolutely clear." Transcript of Oral Argument at 33. In any event, our ultimate conclusion, that the money owed to upstream pipelines is ordinary debt, would not change even if Columbia received the money from it customers and then forwarded it to the upstream pipelines.

[16] Since there is no concrete threat that the upstream pipelines will stop supplying gas to Columbia, we also reject Columbia's argument that paying upstream pipelines is "necessary or appropriate" to Columbia's reorganization under 11 U.S.C. § 105(a).

V. *LOWEST INTERMEDIATE BALANCE TEST*

Our decision that the customer refunds and GRI charges are held in trust does not automatically entitle Columbia's customers and GRI to full payment of the amounts they are owed. To protect the interests of secured and unsecured creditors, beneficiaries of trust funds bear the burden of identifying and tracing their trust property. *See Lehigh*, 657 F.2d at 579.

When a trustee commingles trust funds with other monies in a single account, the lowest intermediate balance rule aids beneficiaries in tracing trust property. *See* 4 L. King, *Collier on Bankruptcy* ¶ 541.13, at 79-80 (1993); 5 A.W. Scott & W.F. Fratcher, *The Law of Trusts* § 518, at 634-36 (4th ed. 1989); Restatement (Second) of Trusts § 202 cmt. j (1959). The lowest intermediate balance rule, a legal construct, allows trust beneficiaries to assume that trust funds are withdrawn last from a commingled account. Once trust money is removed, however, it is not replenished by subsequent deposits. Therefore, the lowest intermediate balance in a commingled account represents trust funds that have never been dissipated and which are reasonably identifiable. Many courts of appeals have embraced the lowest intermediate balance test to determine trust beneficiaries' rights in a commingled account. *See, e.g., First Federal of Michigan v. Barrow*, 878 F.2d 912, 916 (6th Cir. 1989); *Connecticut General Life Ins. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988); *see also United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986) (allowing government to choose to apply lowest intermediate balance test or another test to commingled account containing drug money).

We have never specifically accepted or rejected the lowest intermediate balance test. In *Lehigh*, however, the bank account that contained interline revenues held in trust had been completely dissipated. *Lehigh*, 657

F.2d at 579. We held that the railroads, the beneficiaries of the trust, could not identify any trust funds and therefore could not receive any payments before the other creditors. *See id.* The court in Lehigh acknowledged that beneficiaries lose all property rights in a commingled account when the account is completely dissipated. It requires only a narrow extension of this holding to conclude that a trust beneficiary also loses property rights in a commingled account *to the extent* that the account drops below the amount held in trust.[17] This is the essence of the lowest intermediate balance test.

To apply the lowest intermediate balance test to the customers refunds and GRI surcharges, we must analyze separately the refunds and surcharges that Columbia received pre-petition and those it received and will receive after the bankruptcy filing. When Columbia filed for bankruptcy, the $3.3 million in its general account was insufficient to satisfy its pre-petition obligations to its customers and GRI. The bankruptcy court found that this amount represents the lowest intermediate balance in the general account, and no party has challenged this finding as clearly erroneous. Therefore, Columbia may distribute only the $3.3 million on a pro rata basis to its customers and GRI to satisfy its pre-petition obligations. The remainder of its pre-petition obligations to its customers and GRI will be unsecured debt.

The bankruptcy court also found that no evidence suggests Columbia's post-petition refund or surcharge obligations were ever or will ever be greater than its cash balance in the general account. Therefore, assuming Columbia continues to track these obligations through its accounting system, Columbia may pass through future

---

[17] Our adoption of the lowest intermediate balance test necessarily reflects our disapproval of lower court decisions inconsistent with our holding. *See, e.g., In re New York, Susquehanna and Western Railroad Co.*, 17 B.R. 905 (D.N.J. 1981).

customer refunds and GRI surcharges to its customers and GRI respectively.

VI. *CONCLUSION*

For the foregoing reasons, we will reverse in part and affirm in part the order of the district court, and remand for further proceedings consistent with this opinion.

NYGAARD, *Circuit Judge,* concurring and dissenting.

I concur in the court's opinion, except Part II.B. where the court concludes that the FERC-ordered refunds are held in trust, and Part V. where it applies the lowest intermediate balance test to limit the amount of those refunds Columbia may pass through to its customers. Because I believe that we should not apply traditional trust law in an area that is clearly unsuited for its application, I write separately.

Central to the court's analysis is *In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973) (in banc). There we confronted the issue of whether, under an industry-wide accounting system, railway carriers had any equitable interest in money collected for each other. Although we noted that a "common sense interpretation of this system would indicate that funds collected by one railroad for and in behalf of another railroad are held in trust by the collecting railroad," *id.* at 524, we went on to apply the analytic framework of traditional state trust law. A trust is defined as a fiduciary relationship with respect to property, subjecting the person with legal title to equitable duties to deal with the property for the benefit of another person, "which arises as a result of a manifestation of an *intention* to create it." Restatement (Second) of Trust, § 2 (1959) (emphasis added). The parties' manifestation of intention is the ultimate touchstone of whether or not a trust exists. *Penn Central,* 486 F.2d at 524.

Since the individual railway carriers had not signed trust agreements with each other, manifesting "an intention" to create trusts, the *Penn Central* court had to consider other indicia of a trust relationship. We opined, "Especially important in the present case are (1) the absence of any payment of interest on monies collected during the time they are held by the collecting railroad, and (2) the commingling of the monies with general funds by the collecting railroad." *Id.* Although the rail-

ways commingled collected money with their own accounts, and while generally commingling indicates a debtor-creditor relationship and not a trust, we concluded that commingling was not necessarily conclusive and that it had minimal significance in the extraordinary operation of interline railroads. *Id.* at 524-25. We found the absence of any provision for the payment of interest by the collecting carriers more significant. We noted, "A debtor-creditor relationship entails the right to use another's money, the usual quid pro quo for which is the obligation to pay interest." *Id.* at 524.

The concurrence in *Penn Central* opined that the application of traditional law of trusts to a complex industry governed by pervasive federal regulations may not always be suitable because there exists "the possibility that, in another case, the *absence* of any of the traditional indicators of a trust relationship" may dictate a conclusion contrary to the congressional intent behind the creation of a pervasive system of federal regulations. *Id.* at 532-33 (Adams, J., joined by Weis, J.) (emphasis in original). This appeal is such a case.

None of the traditional indicia of a trust relationship identified by the *Penn Central* court is present here. As expected, there are no separate, express trust agreements. And like the railway's accounting system, Columbia employed a combined cash management system which commingled funds. This was necessitated by the impracticalities of maintaining different accounts for every business purpose. Applying *Penn Central's* reasoning that commingling of funds "is only one indicium and . . . not necessarily conclusive," *id.*, this court concludes that commingling does not preclude a finding of a trust. As for the payment of interest or lack thereof, the dispositive factor in *Penn Central*, the majority tells us that the payment of interest here is also not important because it does not manifest an intention to create a debtor-creditor

relationship instead of a fiduciary relationship because here a statutory provision mandates the interest payments.

I agree with the court to the extent that commingling of funds and payment of interest do not preclude a conclusion that Columbia has no equitable interests in these FERC-mandated refunds under 11 U.S.C. § 541(d). I disagree, however, with the application of trust law when it is clearly unsuited to this issue. When nothing indicates one way or the other whether the parties intended to create a trust, and moreover, Columbia by seeking to distribute these refunds to the customers was simply trying to obey the law, there is no good reason to apply the law of trusts, which after all is predicated upon the intentions of the parties to create a fiduciary duty. Instead, we should balance the competing policies and try to discern the *congressional* intent behind the Bankruptcy Code, 11 U.S.C. § 541(d), and the Natural Gas Act (NGA), 15 U.S.C. § 717 et seq. See *id.* at 533 (concurrence).

Section 541(d) nowhere refers to "trusts"; it provides that if a debtor does not have "any equitable interest" in the property, that property does not become a part of the debtor's estate. A finding of an equitable interest in the FERC-mandated refunds would contravene not only the policies of the NGA, but also the Bankruptcy Code. Under the NGA, all rates and charges must be "just and reasonable," 15 U.S.C. § 717c(a), and Congress empowered FERC to ensure this. If a natural gas company overcharged its customers, FERC may order refunds. *Id.* § 717c(e). After all, these refunds belong to the customers. A natural gas company *must* pass the refunds to its customers upon pain of civil or criminal penalties. See *id.* § 717s(b), 717t. Thus, even without the benefit of the law of trusts, it is clear these refunds arise from a federal statute: they were ordered by a federal agency empowered by Congress; they must be passed through to the customers lest the holder violate the law; therefore, they belong solely to the customers under federal law.

It is undisputed that under the ordinary workings of the NGA Columbia would have no equitable claim to FERC-ordered refunds. See *Texas E. Transmission Corp.*, 39 F.P.C. 630, 642, affirmed, 414 F.2d 344 (5th Cir. 1969); *In re Area Rate Proceeding*, 53 F.P.C. 821, 822 (1975). The creditors, however, appear to argue that Columbia has some equitable interest in the refunds under the Bankruptcy Code; that is, the Code somehow intervenes in the normal regulatory workings of the NGA. But to say that the Code alters the equitable interests of the parties in the refunds is to say that it creates or alters property rights. This then contravenes the policy of the Code, which creates a set of procedures by which a debtor's property is divided, but which does not create substantive property rights. See *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991); L. King, Collier on Bankruptcy, ¶ 541.02[1], at 541.10.1 to -11 (15th ed. 1993). Neither the NGA nor the Code mandates that Columbia has "any equitable interest" in the FERC-ordered refunds, and since they are not a part of the debtor's estate, the creditors have no interest in them.

If the issue is simply whether Columbia has an equitable interest under section 541(d) in the refunds, then, so long as we agree that it does not have such an interest, *how* the court gets to this conclusion may appear academic. It is not. By applying the law of trusts, the majority bootstrapped itself into applying the "lowest intermediate balance" test. That test is premised on the principle that whenever trust funds are commingled and cannot be traced, and all the money is later withdrawn, the trust fund is treated as lost even though funds are later deposited into the account. *Connecticut Gen. Life Ins. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988). So, in cases where the account is reduced to a sum less than the trust fund, the test requires that the trust be considered dissipated except as to the remaining balance. *Id.* See 4 Collier on Bankruptcy ¶ 541.13, at 541-79-80.

Columbia's normal business practice was to minimize its cash balance, and so excess money was either used to pay debts or invested. At the time the bankruptcy petition was filed, Columbia had only $3.3 million in its account, though it had received from upstream suppliers $21 and $1.8 million in prepetition refunds for the downstream customers and the GRI. Since the $3.3 million represents the lowest intermediate balance, the application of trust law to this case will result in a $19.5 million loss to the customers and GRI.

The application of the lowest intermediate balance test is both harsh and arbitrary considering the circumstances, and quite simply wrong. No one disputes that commingling of funds is necessitated by the administrative impracticality of keeping separate accounts for every business purpose. Although the majority recognizes that commingling has "little significance" in determining the existence of a trust because of business necessity, it apparently has great significance in determining the amount Columbia must refund. If business reality dictates that funds be commingled and that cash flow be fluid, which is the case with complex industries, it is arbitrary to freeze the account at the time the bankruptcy petition is filed and say that whatever money withdrawn at that time has been "dissipated." Since the filing of the petition, Columbia's cash flow has exceeded the amount of its obligations to the customers and GRI. Columbia has enough money to pass through all the refunds it received or will receive.[1] The application of the lowest inter-

[1] Even if we apply the law of trust, I note that dissipated funds may be replenished, which is what Columbia did. See Restatement § 202, comment m ("Where the trustee deposits trust funds in his individual account in a bank, and makes withdrawals from the deposit and dissipates the money so withdrawn, and subsequently makes additional deposits to his individual funds in the account, manifesting an intention to make restitution of the trust funds withdrawn, the beneficiary's lien upon the deposit is not limited to the lowest intermediate balance."). See also *In re New York, S. & W. R.R. Co.*, 17 B.R. 905 (D.N.J. 1981).

mediate balance test therefore contravenes the congressional intent behind the Natural Gas Act; under the NGA, these refunds—all of them—belong to the customers, and if Columbia has the ability to pay, trust laws notwithstanding, it should be allowed to pay in full. Thus, other than to adhere rigidly to the principles of trust laws, laws which I do not think applies to this case, there is no good reason to limit the amount of the prepetition refunds to the lowest intermediate balance. I therefore respectfully dissent from Parts II.B. and V. of the majority opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos 91-803, 91-904

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92--239-CLR

MERIDIAN OIL PRODUCTION, INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

OPINION

Dated: July 6, 1992

Wilmington, Delaware

Sue L. Robinson, U.S. District Judge

Jurisdiction

The Court has jurisdiction of these appeals and cross-appeals of the Bankruptcy Court's decision of February 13, 1992 pursuant to 28 U.S.C. § 158.

Introduction

On July 31, 1991 ("Petition Date"), Columbia Gas Transmission Corporation ("TCo") filed a petition for reorganization under Chapter 11 of the Bankruptcy Code

with the Bankruptcy Court for the District of Delaware ("the Bankruptcy Court"). 11 U.S.C. § 1101. (C.A. No. 92-127, Docket Item, "D.I.", 37) TCo, a Delaware corporation, continues to manage and possess its property as a debtor in possession.[1] 11 U.S.C. § 1107, 1108. Neither a trustee nor an examiner has been appointed in the case. (C.A. No. 92-127, D.I. 37)

TCo and its affiliates comprise one of the largest natural gas systems in the United States. (C.A. No. 92-127, D.I. 69, Ex. 1, Petition for Bankruptcy) This conglomerate includes the parent public utility holding company CG, the service company TCo, and eighteen other operating subsidiaries, all of which are engaged predominantly in the exploration and production, purchase, storage, transmission, and distribution of natural gas at wholesale and retail, as well as related resource development. (C.A. No. 92-127, D.I. 69, Ex. 1; D.I. 37) Several of CG's subsidiaries are gas utility companies serving businesses and homes in their respective states. TCo transports and sells gas at wholesale to affiliated and unaffiliated companies through its 18,900 mile pipeline network. TCo serves parts of thirteen Northeastern, Middle Atlantic, Midwest and Southern states and the District of Columbia. To meet its obligations, TCo purchases natural gas from producers in the Southwest, Mid-Continent and Appalachia and from other interstate pipelines. (C.A. No. 92-127, D.I. 37) TCo also operates underground natural gas storage facilities where it offers storage servces to affilated and unaffiliated customers and provides for its own storage needs. The operation is so pervasive that "[o]ver one out of every seven gas customers in the United States is served

---

[1] TCo is a wholly-owned subsidiary of The Columbia Gas System, Inc. ("CG"), which also filed on the Petition Date for Chapter 11 reorganization in the District of Delaware. (C.A. No. 92-127, D.I. 69, Ex. 1; D.I. 37) CG is a Delaware corporation and a public utility holding company. As a debtor in possession, CG continues to possess and manage its properties. (C.A. No. 92-127, D.I. 37).

either directly or indirectly" by TCo or a CG affiliate. (C.A. No. 92-127, D.I. 69, Ex. 1, Affidavit in Support of Chpt. 11 Petition).

TCo's operations are extensively regulated by the Federal Energy Regulatory Commission ("FERC"), pursuant to the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717; 15 U.S.C. § 717(c) (1984). FERC ensures that the rates and charges of a natural gas company are just and reasonable. 15 U.S.C. § 717c(a). FERC also regulates the prices TCo can charge its customers, the areas that may be served, the services that TCo can provide and the terms pursuant to which services are provided. (C.A. No. 92-127, D.I. 37) Since TCo is not exclusively involved in the purchase, sale, storage and transportation of natural gas in interstate commerce, it is not subject to utility regulation by state public utility commissions.

On August 23, 1991, TCo moved the Bankruptcy Court for authorization to comply with its FERC gas tariff and the orders and regulations of FERC to pay certain unsecured prepetition obligations in advance of a confirmed plan of reorganization (the "FERC" motion"). Specifically, TCo sought relief in seven areas, with four issues eventually resolved by settlement or court order. The remaining three, however, form the basis of the appeals and cross-appeals at bar: 1) whether TCo can pay prepetiton charges billed to TCo's upstream pipeline suppliers and transporters, which charges are fully recoverable from TCo's customers if paid; 2) whether TCo can pay prepetition charges to the Gas Research Institute ("GRI") that are fully recovered in TCo's filed FERC tariff; and 3) whether TCo can flow through to its downstream customers refunds received by TCo from upstream pipelines relating to prepetition amounts over-recovered by such upstream pipelines pursuant to FERC orders.

The FERC motion was supported, *inter alia*, by the Customer Committee ("the Customers"), intervenors Pennsylvania Public Utility Commission, Maryland Pub-

lic Service Commission, Public Utilities Commission of Ohio, Maryland Office of People's Counsel, CG and other local distributors. The Unsecured Creditors Committee ("the Committee") and other unsecured creditors opposed the motion. The issues were briefed extensively. The Bankruptcy Court held evidentiary hearings on October 18, October 22 and November 27, 1991. Supplemental post-hearing briefing was entertained.

By Memorandum Opinion of February 13, 1992 the Bankruptcy Court granted the FERC motion in part and denied relief in part. *In the Matter of the Columbia Gas System, Inc.*, 136 B.R. 930 (Bankr. D.Del. 1992). On February 25, 1992, the Committee [2] filed its Notice of

---

[2] The following appeals and cross-appeals were filed: *The Official Committee of Unsecured Creditors of the Columbia Gas Transmission Corporation v. The Columbia Gas System, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-127 (the Committee's emergency appeal of court's 2-13-92 order authorizing TCo to pay certain customer refunds); *Columbia Gas Systems, Inc. v. Unsecured Creditors Committee*, C.A. No. 92-235 (TCo's appeal of court's 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds); *Official Committee/Customers v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-236 (Customer's appeal of court's order granting in part TCo's motion to pay prepetition customer refunds and gas research institute surcharges, granting TCo's motion to pay post-petition customer refunds and denying motion to pay upstream charges); *Energy Development Corp. v. Columbia Gas Systems, Inc, and Columbia Gas Transmission Corp.*, C.A. No. 92-237 (Energy Development Corp.'s cross-appeal of court's 2-13-92 order authorizing TCo to comply with FERC gas tariff and order and regulations of the FERC); *West Ohio Gas Co., Virginia Natural Gas, Inc. and Peoples Natural Gas Co. v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-238 (joint appeal of 2-13-92 court order granting in part and denying in part TCo's FERC motion; specifically paragraph one as it denies TCo's motion to pay customer's category one refunds and prepetition gas research institute surcharges in excess of $3.3 million); *Meridian Oil Production, Inc. v. Columbia Gas Systems, Inc., and Columbia Gas Transmission Corp.*, C.A. No. 92-239 (Meridian's cross-appeal of 2-13-92 order authorizing TCo to comply with FERC gas tariff

Appeal with the Court and then moved for an emergency stay pending appeal. (C.A. No. 92-127, D.I. 1). By Memorandum Opinion of March 10, 1992, the Court granted the stay pending an expedited appeal. *In re Columbia Gas System, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-127, 1992 U.S. Dist. LEXIS 3253 (D.Del. 1992); (C.A. No. 92-127, D.I. 18). A scheduling conference was held on March 23, 1992, where accelerated briefing was ordered. (C.A. No. 92-127, D.I. 31). On May 5, 1992, oral argument on the expedited appeal was held.

Although we find the Bankruptcy Court's decision to be a pragmatic one, we respectfully disagree with its conclusion that a trust relationship exists between TCo and its customers vis-a-vis the FERC ordered payments. With respect to upstream pipeline charges, we agree with the result reached by the Bankruptcy Court, but for different reasons do not find a trust relationship evident. Accordingly, for the reasons that follow, the decision is reversed in part and affirmed in part.

---

and orders of FERC); *Ozark Gas Transmission System and Ozark Finance Corporation v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-240 (Ozark's appeal of 2-13-92 order authorizing *inter alia* TCo to pay certain customer refunds); *Pennsylvania Public Utility Commission v. Columbia Gas Systems, Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-241 (Pennsylvania's cross-appeal of 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds); *Maryland Office/People's Council v. Columbia Gas Systems, Inc., and Columbia Gas Transmission Corp.*, C.A. No. 92-242 (Maryland's cross-appeal of 2-13-92 order authorizing TCo, *inter alia*, to pay certain customer refunds); *Public Utilities Commission/Ohio v. Columbia Gas Systems Inc. and Columbia Gas Transmission Corp.*, C.A. No. 92-243 (cross-appeal of 2-13-92 order authorizing, *inter alia*, TCo to pay certain customer refunds; Tennessee Gas Pipeline Company's Motion to Intervene was granted on April 6, 1992 (C.A. No. 92-127, D.I. 43)). In view of the commonality of challenges to the bankruptcy court's February 14, 1992 memorandum opinion and order, the cases were reviewed together.

SCOPE OF REVIEW

The Bankruptcy Court's decisions of law are subject to *de novo review. Meridian Bank v. Alten,* 958 F.2d 1226, 1229 (3d Cir. 1992); *In re: The Columbia Gas System, Inc. and Columbia Gas Transmission Corp.,* C.A. No. 92-127, 1992 U.S. Dist. LEXIS 3253 (D.Del. 1992); *In Re Public Service Co. of New Hampshire,* 116 B.R. 347, 349 n.2 (Bankr. D.N.H. 1990); *In re Pacor,* 110 B.R. 686, 687 (E.D. Pa. 1990). A district court will not set aside findings of fact unless clearly erroneous. *First American Bank of New York v. Century Glove,* 81 B.R. 274, 277 (D.Del. 1988), *aff'd in part* 860 F.2d 94, 100 (3d Cir. 1988); *United States v. Owens,* 84 B.R. 361, 363 (E.D. Pa. 1988); Bankruptcy Rule 8013. Where "findings of fact are based on an incorrect legal standard, those findings are subject to plenary review on appeal." *Century Glove,* 81 B.R. at 278. The Court must further " 'break down mixed questions of law and fact applying the appropriate standard for each component.' " *Meridian Bank v. Alten,* 958 F.2d at 1229, *quoting In re Sharon Steel Corp.,* 871 F.2d 1217, 1222 (3d Cir. 1989). A "mixed question of law and fact is found whenever a legal precept is applied to the sum of the facts of the case." *Meridian Bank v. Alten,* 958 F.2d at 1229.

BACKGROUND

After three days of hearings on the FERC motion, the Bankruptcy Court delineated facts that we find are not clearly erroneous. The court found that TCo sells gas to local distribution companies or other customers. 136 B.R. at 932. Each business relationship consists of an executed "contract, relating to either the purchase, storage, transportation or sale of gas." *Id.* TCo's rate charges vary from customer to customer; generally, however, TCo "sells or transports about one billion decatherms [(a measure of the amount of gas needed to produce a certain amount of heat)] of gas per year." *Id.*

TCo's gas operations are governed by the NGA and the powers of the FERC. The Bankruptcy Court found that FERC's ratemaking procedure is delineated in 18 C.F.R. Part 154 (1991). *Id.* "If FERC determines that a rate TCo is charging a customer is too low, FERC cannot retroactively increase the rate that TCo charges a customer." *Id.* Rather, FERC "adjusts for the discrepany on a dollar-for-dollar basis in prospectively setting TCo's rates." *Id.* Conversely, when a rate to a customer is deemed excessive, FERC can order refund disbursement and adjust rates prospectively. *Id.*[3] A "compilation of the rates TCo charges its various customers along with copies of its service agreements comprises TCo's 'tariff,' a multi-volume book." *Id.* "TCo's contracts with its downstream customers usually incorporate the applicable terms and conditions from its tariff." *Id.*

The purchased gas adjustment and the general rate are the two components of TCo's gas rate for each customer. *Id.* The former "reflects the cost of gas (price per decatherm times decatherms sold) (TCo purchases from each supplier." *Id.* Because TCo cannot predict exactly the purchased gas adjustment costs, TCo is required to file estimated purchase costs every three months. Yearly, the purchased gas adjustment costs are compared by FERC with actual costs and FERC reconciles rates by adjusting them accordingly. Generally, TCo is not allowed to profit from the purchased gas component. The Bankruptcy Court found that the purchased gas adjustment is not required by the NGA; however, since 1972 it has been used extensively and is recognized by the gas industry as a way for TCo to "pass through" its purchase gas adjustment costs to its customers. *Id.*

The other gas rate component, the general rate, includes TCo's "internal non-gas costs, other charges, and a FERC-authorized rate of return (about 13% in the Fall of 1991) based upon the Federal Reserve prime rate."

---

[3] FERC also reviews and modifies the rates gas suppliers charge.

136 B.R. at 933. Should TCo contemplate a general rate increase, it must forward a proposal, as well as supporting information to FERC, which issues an order within 30 days. If FERC approves the proposed increase, it is "subject to refund." *Id.* Thereafter, "FERC conducts a due process hearing, reviews the filing, reconciles it with TCo's actual non-purchase costs, and determines whether TCo has under-recovered or over-recovered its costs for a given period of time." *Id.* TCo can be ordered to refund amounts noted as over-recovered and prospectively reduce the rate should FERC conclude that a filed rate was unjust. "Refunds include interest from the date of collection at a rate based on the prime rate." *Id.* The timing and method of refunds is addressed by tariffs.

The Bankruptcy Court found that the natural gas industry experienced pervasive problems in the mid-1980's when the price of gas dropped substantially. Consequently, many contracts with higher than market prices between pipelines and producers became uneconomical. To reduce the financial burdens incurred, FERC allowed pipelines to reform their contracts with producers by either buyouts or buydowns. In 1987, FERC developed Order No. 500 which permitted TCo's upstream pipelines to recover, subject to refund, a portion of the costs associated with the buyouts and buydowns by passing through this portion to their downstream customers. *Id.* While pipelines have been utilizing the pass through mechanism since 1987, Order No. 500 has been the subject of extensive litigation, *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied* —— U.S. ——, 111 S.Ct. 277 (1990), eventually resulting in FERC's instituting Order No. 528 to ameliorate the deficiencies. This latter Order allowed TCo's upstream pipelines to pass through a much smaller portion of their buyout and buydown costs than allowed under Order No. 500. "Thus Order No. 528 anticipates that TCo, and hence its customers, will receive thousands of

distinct refunds." *Id.* Although proceedings are now underway to ascertain the exact source and period of overcharge as well as the recipient customer, the Bankruptcy Court determined that TCo and its customers are entitled to "Order No. 528 refunds totalling approximately $134 million." *Id.*

The Bankruptcy Court found other "FERC-ordered refunds that TCo wishes to honor": "These refunds total about $26.5 million, for a grand total of $160 million TCo seeks permission by its FERC motion to pass through to its customers." *Id.* On the Petition Date, the Bankruptcy Court found TCo "had received but not passed through about $21 million in FERC ordered refunds"; "[p]ostpetition, TCo expects to receive approximately an additional $140 million in refunds." *Id.* By statute, TCo is required to pay a FERC-prescribed interest on refunds already received. *Id. See* 15 U.S.C. § 717 c(e); 18 C.F.R. § 154.67(c) (1991).

The Bankruptcy Court made certain findings as to TCo's cash management and accounting systems. Described as "normal business practice," the Bankruptcy Court found that TCo daily utilized the excess of deposits over disbursements for investment or paydown of short term debt to TCo, resulting in TCo's possessing very little cash on hand. 136 B.R. at 934. On the Petition Date, TCo possessed only $3.3 million in cash. Despite this internal business practice, TCo is required to follow FERC-mandated accounting procedures. 18 C.F.R. Part 201, subchapter F. The Bankruptcy Court described TCo's management of refunds as follows:

> When TCo receives a refund, *it treats the refunds as an increase to its assets. TCo simultaneously creates a corresponding liability on its books reflecting its obligation to the corresponding customer.* As long as the refund is passed through within eight and a half months of the year in which the refund was re-

> ceived, TCo need not pay income tax on the refund asset.
>
> TCo tracks the various refunds it passes through using "accounting accounts." These accounts are not actual money accounts, but are mathematical and informational mechanisms for complying with the difficult task of sorting out its refund obligations. The accounting accounts thus segregate refunds by: 1. Source of refund; 2. Legal reason for the refund; 3. Time period to which the refund relates; and 4. Designated downstream recipient of the refund.
>
> TCo maintains on the order of 100 accounting accounts.
>
> *TCo, however, does not maintain separate bank accounts for the different categories of refunds. It uses a combined cash management system. This system receives cash from many different sources, and uses the cash without restriction.* The pooling of funds allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash.
>
> TCo receives refunds from upstream suppliers and transporters of gas in the form of checks, wire transfers, and billing credits. TCo normally passes through refunds in the same manner. If the FERC motion is granted, TCo will pay a portion of the refunds out of cash funds, and a portion through "billing credits" imposed upon future billings to the customers for future gas sales.

Id. (emphasis added).

Also factoring into this scenario are Gas Research Institute ("GRI") surcharges. The Bankruptcy Court determined that GRI, a "not-for-profit, tax-exempt research and scientific organization", "does not provide any direct services to TCo". *Id.* GRI funding comes from "sur-

charges that FERC imposes on the sale and transportation of gas"; "FERC regulations and orders require TCo to collect these surcharges from its customers, and then pay these amounts to GRI within 15 days." *Id.* The Bankruptcy Court found that TCo maintains separate accounting records for these charges.

Based on these facts, the Bankruptcy Court formed legal conclusions that are subject to plenary review. *In re Pacor*, 110 B.R. at 687. For analytical purposes, the Bankruptcy Court divided the refunds into two categories: 1) refunds received prepetition and to which there is a final FERC order; and 2) those refunds that TCo has received or will receive postpetition. Applying federal common law, rather than state law, the Bankruptcy Court concluded that the refunds received by TCo from its upstream suppliers were not property of the bankruptcy estate but were held in trust [4] by TCo for the benefit of TCo's downstream customers. Nonetheless, the Bankruptcy Court did not allow all of the refunds to flow through currently to the customers. Relying on trust tracing principles as enunciated in *In re Penn Central Transp. Co.*, 486 F.2d 519 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974), the Bankruptcy Court determined that the $3.3 million in cash possessed by TCo on the Petition Date was the lowest intermediate balance held; therefore, those refunds received prepetition, totalling $21 million in refunds and $1.8 million in GRI sur-

[4] The court's finding of a trust relationship, whereby TCo held legal title but no equitable interest in the funds for its customers, allowed the refunds to evade inclusion in TCo's bankruptcy estate. "Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'" *Beiger v. I.R.S.*, 496 U.S. 53, ——, 110 S.Ct. 2258, 2263 (1990). 11 U.S.C. § 541(d) provides: "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . ., becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not of any equitable interest in such property that the debtor does not hold."

charges, could be paid "only on a pro rata basis in an amount not exceeding $3.3 million." 136 B.R. at 939. As to refunds received postpetition, the Bankruptcy Court found TCo had proved sufficient cash resources to pay present and future obligations and, therefore, allowed those refunds to pass unlimited. The Bankruptcy Court then denied the motion, however, to allow upstream payments because there was no trust relationship demonstrated. The Bankruptcy Court concluded that the upstream payments were for goods and services already received from TCo. More significantly, the monies TCo would use to pay upstream suppliers have not yet been collected from downstream customers; current upstream payments, therefore, could not be traced to a particular source. *Id.* at 940.

In adjudicating refunds and upstream surcharges, the Bankruptcy Court rejected TCo's advancement of 11 U.S.C. §§ 105 and 1108 for authority to order such payments. TCo argued that inability to make the payments would jeopardize its relationship with its customers and, ostensibly, interfere with its efforts to reorganize under Chapter 11. The Bankruptcy Court found as a matter of law that TCo's allegations were insufficient. Specifically, the Bankruptcy Court concluded that TCo had failed to demonstrate the necessity of such payments to compel use of this broad power. *Id.* at 939.

ISSUE ONE: CUSTOMER REFUNDS [5]

The Committee [6] contends the Bankruptcy Court erroneously applied federal common law to establish the

---

[5] For purposes of this Opinion, references to "customer refunds" include those to downstream distributors and Gas Research Institute surcharges, received prepetition and postpetition.

[6] Despite the numerous appeals and cross-appeals, the arguments essentially divide into two camps on three discrete issues. First, those arguing for reversal of the Bankruptcy Court's decision as to the finding of a trust relationship between TCo and its customers,

existence of a trust and, as a result, ignored the Bankruptcy Code's mandate of equality of distribution among creditors. (C.A. No. 92-127, D.I. 34) The Bankruptcy Court's reliance on *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir. 1981) was misplaced, argues the Committee, for the Bankruptcy Court read the decision too broadly. The instances where a federal court can supplant state law rules of decision are rare and certainly not evident at bar. *Jaffke v. Dunham*, 352 U.S. 280 (1957); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Since neither the NGA nor the Bankruptcy Code preempt state law on the issue of trusts, *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 143 (1960); *Pennzoil Co. v. FERC*, 645 F.2d 360, 384 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); *United States v. Kalishman*, 346 F.2d 514, 517 (8th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966), the Committee asserts that the Bankruptcy Code takes precedence over other statutes and governs in any case where there might be a conflict. (C.A. No. 92-127, D.I. 34); *United States v. Kalishman*, 346 F.2d at 517. Regardless of which law is applied, however, the Committee maintains the record is devoid of the indicia required for a trust relationship.

The Customers argue the Bankruptcy Court correctly found the existence of a trust by concentrating on the intention of the parties and the significance of the Congressionally prescribed regulatory scheme. (C.A. No. 92-

---

with the alternative argument that the lowest intermediate balance trust tracing principle was applied correctly to limit the amount of refunds, are referenced as the Committee's position. In opposition, arguing for affirmance on the finding of a trust, yet reversal on the application of the lowest intermediate balance rule as applied too restrictively, are TCo and the Customers, with specific identification noted for particular points. On the second issue, arguments for reversal of the Bankruptcy Court's decision as to upstream pipeline charges are attributable to Ozark Gas. Positions in opposition shall be cited to as Meridian Oil's. Third, TCo asserts the Bankruptcy Court erred in denying relief pursuant to 11 U.S.C. §§ 105 and 1108. An opposing position is presented by the Committee.

127, D.I. 36) They assert the elaborate regulatory system mandates a flow through of refunds and this Court should not intervene to disturb the scheme. There is no conflict between FERC and the Bankruptcy Code because the latter particularly exempts monies held in trust from the effects of the Code. Moreover, the Customers argue that the Court must follow the Third Circuit's directives in *Lehigh* and *Penn Central* and apply federal common law, then weigh the elements of a trust against the record, with due regard given to the complex regulatory system. The Customers contend that the facts herein reflect a trust relationship because: 1) TCo cannot retain the money forever; 2) it is in the public's best interest to order refunds so that rates are just and reasonable; and 3) TCo merely acts as a conduit of the money which, by regulation, must pass to the customers. As to the admitted commingling of refunds with other TCo money, the Customers contend the Bankruptcy Court was correct in recognizing, as the Third Circuit did in *Penn Central,* that the system is an unpreventable consequence of modern practice. To deny refunds on this technicality would be unfair and would render rates illegal.

TCo emphasizes that the issue is not merely whether the Bankruptcy Court applied the correct law; instead, the focus must be on the complex regulatory scheme and the interests of the public which demand recognition of a trust relationship. Within this regulatory framework, FERC has concluded that the refunds must pass to the customers. The refunds do not belong to TCo. Rather, TCo acts as a mere conduit, without economic or equitable interests, collecting refunds and then passing them through to the customers. Because FERC allows the proposed rates to go into effect before calculations are made, the entire ratemaking process is constantly being adjusted retrospectively to achieve the ultimate goal of just and reasonable rates.

Essentially, then, the issue before the Court is whether the Bankruptcy Court was correct in finding that TCo

held the refunds in trust for its customers. Like the Bankruptcy Court, our analysis begins with determining whether to apply federal common law or state law principles. Generally, a debtor's interest in property rights is reviewed under state law. *Butner v. United States,* 440 U.S. 48, 54-55 (1979) (the Bankruptcy Code generally leaves the question of property rights to state law); *In re Nejberger,* 934 F.2d 1300, 1302 (3d Cir. 1991) ("We must look to state law to determine if a property right exists and to stake out its dimensions."); *In re Roach,* 824 F.2d 1370, 1374 (3d Cir. 1987) (same); *Matter of Columbia Gas System, Inc.,* 136 B.R. at 935. Accordingly, "absent a countervailing federal interest, 'the basic federal rule is that state law governs.' " *In re Roach,* 824 F.2d at 1374, *quoting Butner v. United States,* 440 U.S. at 48, 57. There are limited circumstances, however, when a federal court may develop and apply federal common law:

> [A]bsent some Congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate and international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (citations omitted); *Com. of Pa., Dept. of Public Welfare v. U.S.,* 781 F.2d 334, 342 (3d Cir. 1986) ("[F]ederal courts develop their own common law only where necessary to protect important federal interests, and only where Congress has not addressed the issue."); *Milwaukee v. Illinois,* 451 U.S. 304, 312 (1981)

(same); *Erie R.R. v. Tompkins,* 304 U.S. 64, 78 (1938) (there is no federal general common law); *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) (exception to *Erie,* where federal common law applied to suit brought by the United States, related to commercial paper). Neither the second nor third circumstances are implicated by the facts at bar. The first exception, however, represents the basis for the Bankruptcy Court's departure from state law.

Relying on *United States v. Standard Oil Co.,* 332 U.S. 301 (1947) and, especially, *Matter of Lehigh and N.E. Rye Co.,* 657 F.2d 570 (3d Cir. 1981), the Bankruptcy Court concluded that federal common law applied at bar because the case involved "specialized matters of essentially a federal character," 136 B.R. at 935. An examination of *Standard Oil* and *Lehigh* against the record, however, demonstrate that the application of federal common law is misplaced.

In *Standard Oil,* the Supreme Court was faced with a choice between state or federal law in a suit brought by the government to recover expenses incurred to treat a soldier injured by a truck driven by an employee of defendant Standard Oil Company. 332 U.S. at 302. The government paid the soldier's hospital bill and continued to compensate him during his disability. The soldier had signed a release in exchange for $300.00, releasing Standard Oil and its employee of any claims or demands. *Id.* In resolving whether the government could recover the amounts expended for hospitalization and soldier's pay, the Court debated whether state or federal law applied. *Id.* at 303. After discussing a number of factors, as well as the reasons for avoiding *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938), the Court applied federal law and denied the government's attempt to create a new cause of action in the absence of Congressional mandate. *Id.* at 314-16. In so doing, the Court noted the distinctly federal question involved and the particularly federal character of the relationship between the government and members of the armed forces.

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between a person in service and the Government are fundamentally derived from federal sources and governed by federal authority. . . . For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, equally clearly, it has power in execution of the same functions to protect the relation once formed from harm inflicted by others.

Id. at 305-306. A relationship similar to the government and armed service personnel is not evident herein. Specifically, the government is a regulator of the natural gas industry and not directly involved with the refunds or the relationship between TCo and its customers. Unlike *Standard Oil,* the government is not a party, has not advanced a position on the issues and, importantly, does not have a financial interest in these private commercial transactions.

Likewise, *Lehigh* does not support adoption of federal common law. There, the Third Circuit was faced with a railroad which had entered receivership and expended all of its general funds. A group of interline railroads successfully argued that a trust relationship existed between the debtor railroad and the interline railroads and, as a result, the latter were permitted to receive prereceivership revenues. Before the court [7] was whether the priorities

---

[7] The Third Circuit recently commented on the appropriate law for trust analysis in *Goldberg v. New Jersey Lawyers' Fund,* 932 F.2d 273, 280 (3d Cir. 1991). To "establish rights as a trust recipient, a claimant [bankruptcy] must make two showings: (1) demonstrate that the trust relationship and its legal source exist, and (2) identify and trace the trust funds if they are commingled. Whereas, the first showing is generally a question of state law,

established for the valuation of proceeds was correct. Prior to addressing the substantive issue, the court concluded that federal common law, rather than state law, applied:

> [T]he funds in question arose out of railroad operations in interstate commerce, the regulation of which is under the exclusive control of Congress. . . .
>
> Second, Congressional concern with the establishment and maintenance of a viable national rail system has been expressed in legislation designated to encourage and facilitate interline rail transportation, notably the Interstate Commerce Act . . . and Regional Rail Reorganization Act. . . .
>
> Third, by establishing the Interstate Commerce Commission, Congress sought to regulate interstate commerce by rail, as well as by other means. In so doing, Congress required regulation of rates among the various railroads. . . . The extent of the national interest affected by such rate regulation has been recognized by the Supreme Court in a number of cases where states themselves sought to prescribe rates in a manner that conflicted with national regulations. . . .
>
> Finally, it is manifest that uniformity is required in the manner and means by which interline freight accounts are balanced.

657 F.2d at 570, 574-75.

While the refunds herein derive from TCo's operations in the Congressionally controlled natural gas industry, the distinctions between the regulatory schemes compel rejection of federal common law. First, regulation of the natural gas industry is far less pervasive than the railroad

---

the second showing 'because it pertains to distribution of assets from an entity in [a] federal bankruptcy [proceeding] is exclusively a question of federal law.' " (Citations omitted)

industry, the operations of which are governed by the Interstate Commerce Act and the Regional Rail Reorganization Act. The Supreme Court has described the difference as follows:

> [The Natural Gas Act] evinces no purpose to abrogate private rate contracts as such. . . . In this respect, the Natural Gas Act is in marked contrast to the Interstate Commerce Act [regulator of the railroads], which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. . . . The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are required by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338-39 (1956) (reviewing NGA and predecessor of FERC, the Federal Power Commission) (citations omitted); *United Gas Pipeline Co. v. Memphis, Light, Gas & Water Div.*, 358 U.S. 103, 109-110 (1958). Furthermore, while the refunds arose from FERC's perpetual retrospection of charges and rates to reconcile over and

under charges, the manner in which TCo managed the refunds internally, replete with commingling and use of the money, is not statutorily prescribed.

The explicit exemption from the general bankruptcy scheme created by Congress for the railroads is another distinction between the regulatory schemes. 11 U.S.C. § 1161, *et seq.* There is no comparable provision for the natural gas industry. Moreover, the government's interest is more intimate in the railroad industry because the government is an owner and regulator of railroads. Both Amtrak and Conrail were created by Acts of Congress, "and the federal government owns, or owned at [one] time, more than half of the respective capital stock of each entity." *In re Rail Collision near Chase,* 680 F.Supp. 728, 730 (D.Md. 1987); 45 U.S.C. §§ 501, 701. This interest was recently evidenced by the swift action of the Congress and the President to stop a national railroad strike that threatened to paralyze the economy. Joint Resolution Publ. L. No. 102-306 (June 26, 1992) ("Whereas Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services" and "has in the past enacted legislation for such purposes", it enacted a joint resolution "[t]o provide for a settlement of the railroad labor-management disputes between certain railroads and certain of their employees.") The rights and obligations of the government are absent in the natural gas industry. *Compare Bolye v. United Technologies Corp.,* 487 U.S. 500 (1988).

Having found the Bankruptcy Court's justification for applying federal common law uncompelling, this Court cannot apply federal law in the absence of an explicit statutory mandate. *Texas Indust. Inc. v. Radcliff Materials Inc.,* 451 U.S. 630 (1981); *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966). The Natural Gas Act neither refers to the effects of bankruptcy, which implicate these facts, nor mandates application of federal

common law. *Panhandle Eastern Line Co. v. Public Serv. Comm'n,* 332 U.S. 507 (1947); *Pennzoil Co. v. FERC,* 645 F.2d 360, 384-85 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982); *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n,* 461 U.S. 375, 378 (1983) (With the NGA, "Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce and created the Federal Power Commission . . . [now FERC] . . . to carry out that task."). There is nothing to suggest Congress intended the NGA to preempt the Code or state trust law. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 308 (1988) (NGA preempts "state law whose central purpose is to regulate matters that Congress intended FERC to regulate [rate-making]; . . . [E]very state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted.") (citations omitted). *Compare Packers and Stockyards Act,* 7 U.S.C. § 196 (1992) (statutory trust established for protection of public interest from inadequate financing arrangements); *Perishable Agricultural Commodities Act,* 7 U.S.C. § 499(c) (1992). Nor do Order Nos. 500 and 528 provide guidance. Finally, none of these sources even discuss trusts to implicate the issues herein.

The appropriate law to apply under the NGA was recently analyzed by the Sixth Circuit in *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement,* No. 91-3360, 1992 U.S. App. LEXIS 8840 (6th Cir. 1992), an eminent domain action filed pursuant to the NGA. Before the court was whether a commission, appointed by the district court under Fed.R.Civ.P. 71A (h), applied the correct standard for determining the compensation owed to defendants, homeowners of land used for natural gas storage. Although the case was filed pursuant to express provisions of the NGA, 15 U.S.C. § 717f (b), the Sixth Circuit nonetheless weighed whether state

or federal common law governed questions of remedy and compensation. The court commenced its analysis with *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), a case in which the Supreme Court concluded federal law should govern where there were "competing private and federal liens . . . in the absence of a federal statutory scheme setting priorities." 1992 U.S. App. LEXIS 8840, at 7. The Sixth Circuit embraced the *Kimbell* analysis and looked to the following factors in order to determine whether courts should formulate a "uniform federal common law rule or adopt state law as the federal standard":

> (1) the need for a nationally uniform body of law, (2) whether the application of state law would frustrate specific objectives of the federal program at issue, and (3) the extent to which application of a federal rule would upset commercial relationships predicated on state law.

Id. at 7, 9-10, referencing *Kimbell,* 440 U.S. at 728-29. *Accord Kamen v. Kemper Financial Services,* 111 S.Ct. 1711 (1991), Applying *Kimbell,* the Sixth circuit first concluded that evaluation of the NGA section was a federal law issue. Then the court turned to examine the statutory language for guidance on whether to develop a federal common law as the federal standard or to utilize the law of the state where the condemned land was located. *Id.* at 13. The NGA section simplified the issue by directing the court to the " 'practice and procedure' of the state in which the subject property is located". *Id.* at 13-14. Despite the clear statutory mandate, the court looked to caselaw for additional guidance. The court's reasons for selecting state law are pertinent to the issues at bar:

> [1] [P]roperty rights have traditionally been, and to a large degree are still, defined in substantial part by state law. . . .
>
> [2] [W]e are confident that incorporating state law as the federal standard will not frustrate the specific

> objectives of the Natural Gas Act. . . . To the extent that compensation under state law might deviate from that under a federal rule, we believe this variance, in the aggregate, is far too speculative to warrant displacing state law. . . .
>
> [3] [W]e are unconvinced that fashioning a nationally uniform rule of compensation for private parties exercising their power of eminent domain under the Natural Gas Act is necessary in this case. . . . Moreover, nothing in the statutory scheme of the Act "evidences a distinct need for nationwide legal standards." . . .
>
> [4] [T]he legislative history of § 717f(h) suggests it was intended to mirror the parallel provision of the Federal Power Act. . . . The court in *Georgia Power* concluded that the Federal Power Act's legislative history warranted the application of state law.

Id. at 19-22 (citations omitted).

While the Customers urge this Court to ignore the Sixth Circuit's decision in *Columbia Gas Transmission Corp.* because the factual and legal issues are distinguishable and the holding predictable in view of the express statutory language embracing state law principles, we find the analysis helpful. First, like *Columbia Gas Transmission Corp.*, the dispute herein involves property rights which are traditionally resolved under state law. Second, the court's recognition of an absence of anything in the NGA to mandate use of federal common law based on an important federal interest lends support for our choice of state law principles as the appropriate standard for trust analysis. Indeed, the issues herein present an easier resolution than those presented to the Sixth Circuit, as we have two federal statutes, one of which (the NGA) is entirely silent on the issues of applicable law (trusts and bankruptcy), while the other (the Bankruptcy Code) directs review according to traditional state law principles.

With regard to each statute, Congress obviously has the power of clarification; we read the silence of Congress in the NGA as supporting the application of state law principles. Furthermore, where there is a conflict between the Bankruptcy Code and a competing statute, the Code, generally, takes precedence. *N.L.R.B. v. Bildisco and Bildisco,* 465 U.S. 513, 532 (1984) (conflict between National Labor Relations Act and Bankruptcy Code resolved in favor of the Code); *United States v. Randall,* 401 U.S. 513, 515 (1971) ("Bankruptcy Act . . . is an overriding statement of federal policy on this question of priorities"). *See also United States v. Kalishman,* 346 F.2d 514, 516 (8th Cir. 1965), *cert. denied* 384 U.S. 1003 (1966); *In re Chateaugay Corp.,* 944 F.2d 997, 1002 (2d Cir. 1991).

Having found no compelling reason to apply federal law, we turn to whether the facts of record establish a trust relationship under state law. The situs [8] of the alleged trust determines which state's trust law applies. *Coriell v. Hudson,* 563 F.2d 978, 980 (10th Cir. 1977). The Bankruptcy Petition [9] reflects that the refund monies were held in bank accounts in Charleston, West Virginia; Pittsburgh, Pennsylvania; New York, New York; Wilmington, Delaware; and Columbus, Ohio. (C.A. No. 92-127, D.I. 41, Ex. 1 at A21, Schedule B—Personal Property). The Third Circuit's approach to the choice of law is: "The Restate-

---

[8] The Customers and TCo have not addressed which state's law applies because they submit choice of law is not determinative as the same result is reached under either standard. (C.A. No. 92-127, D.I. 77). However, they maintain, federal common law as discussed in *Lehigh* and *Penn Central* is dispositive.

[9] Since we find that the Bankruptcy Court applied the wrong standard, we apply a plenary review of the record for the limited purpose of locating the refunds, and for examining the form contracts of TCo. *Meridian Bank v. Alton,* 958 F.2d at 1226, 1229. Because the record established by the Bankruptcy Court is sufficient for examining the remaining elements of a trust, a complete plenary review is unnecessary.

ment of Trusts provides the applicable common-law rules absent contrary local rules." *Smith v. Williams,* 698 F.2d 611, 614 (3d Cir. 1983). Delaware, Pennsylvania, New York and Ohio have essentially applied the trust analysis of the Restatement. *Walsh v. St. Joseph's Home for the Aged,* 303 A.2d 691, 695 (Del. Ch. 1973); *Follansbee-Merion Historic Assoc's v. Historical Improvement Ltd. Partnership,* No. Civ. Act. 87-2763, 1989 U.S. Dist. LEXIS 8377 (E.D.Pa. 1989); *In re Fontanella,* 304 N.Y.S.2d 829, 831-32 (N.Y. App. Di. 1969); *Morris v. Investment Life Ins. Co.,* 248 N.E.2d 216, 225 (Ohio Ct. App. 1969), *aff'd* 272 N.E.2d 105 (Ohio 1971). While West Virginia has not expressly adopted the Restatement, there is no contrary local rule that would affect our review.

An "express trust is created 'only if the settlor properly manifests an intention to create a trust.' " *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 769 F.Supp. 671, 712 (D.Del. 1991), *quoting Restatement (Second) of Trusts* § 23 at 66 (1959); 1 Scott on Trusts § 17 at 224 (William F. Fratcher ed., 4th ed. 1987). There must be a manifestation of intent to create a trust and a particular property or res. *In re Martin,* 35 B.R. 982, 985 (Bankr. E.D. Pa. 1984). The "settlor must express in definite terms his intention to subject himself to equitable duties to deal with the trust res for the benefit of the beneficiary." *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 769 F.Supp at 712.

Essential to the existence of a trust is a distinct showing of the parties' intent.

> It is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not he knows the precise characteristics of the relationship which is called a trust.
>
> By manifestation of intention is meant the external expression of intention as distinguished from undisclosed intention . . .

> On the other hand, no trust is created unless the settlor manifests an intention to impose enforceable duties.

Restatement (Second) of Trusts § 23, Comment a, at 66. Moreover:

> If one person pay money to another, it depends upon the manifested intention of the parties whether a trust or debt is created. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor third person, a trust is created. If the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor to a third person, a debt is created.

Restatement (Second) of Trusts, § 12, Comment g; *accord* Scott on Trusts, § 12.2 p.133.

Weighing these factors against the record, there is no evidence of a trust between TCo and its customers. As to an intention to create a trust relationship, the Bankruptcy Court fashioned neither factual determinations nor legal conclusions. We, therefore, review the Bankruptcy Court's findings for indicia of a trust relationship. First we review the form contracts between the customers and TCo for express language reflecting a trust relationship. (C.A. No. 92-127, D.I. 34, Ex. 2) The contracts explicitly detail the terms of billing and payments, yet significantly include no indication of a trust relationship. There have been no representations of the contracts containing express language of trust intent. Although the FERC's retrospective procedures mandate refunds, the refunds are based directly on these contracts. Likewise, the NGA, FERC Accounting System,[10] and Order Nos. 500 and 528 are devoid of express language indicating a trust.

---

[10] Accounts, Natural Gas Act, 18 C.F.R. Part 201 (1991); 18 C.F.R. § 154.67.

Moreover, TCo's handling of the refunds more resembles a debtor-creditor, rather than trustee-beneficiary, relationship. Restatement (Second) of Trusts § 12, Comment g; *see, e.g., In re Delaware & H. R. Co.*, 127 B.R. 756, 757-58 (Bankr. D.Del. 1991). Specifically, TCo uses the money unrestrictedly for debt servicing and investment. Although separate accounting of refunds are kept, TCo does not maintain separate bank accounts for different categories of refunds. As the Bankruptcy Court recognized, while this commingling of funds may have promoted efficient business practices, it weighs against a trust relationship. *Elliott v. Bumb*, 356 F.2d 749, 755 (9th Cir.), *cert. denied* 385 U.S. 829 (1966). The augmentation of interest further reflects a debtor-creditor relationship. Restatement (Second) of Trusts § 12, Comment g.

Alternatively, we reach the same result applying the Bankruptcy Court's test under federal common law. In *Penn Central*, the Third Circuit enumerated the criteria of a trust relationship:

> In applying the law of trusts, it will be necessary to examine the manifestation of intent of the parties, not only in terms of written documents, but also in terms of the conduct of the parties. Especially important in the present case are (1) the absence of any payment of interest on monies collected during the time they are held by the collecting railroad, and (2) the commingling of the monies with general funds by the collecting railroad. . . . The parties' manifestation of intention ultimately controls whether or not a trust relationship exists, but failure to expressly designate the relationship as one of trust does not necessarily negate its existence. . . . When the language of the parties fails to clearly indicate their intention, it may be ascertained by other objective manifestations of intent, such as the facts and circumstances surrounding the transaction and the relationship of the parties. . . . A debtor-creditor relationship entails the right

> to use another's money, the usual quid pro quo for which is the obligation to pay interest. . . . While generally commingling indicates a debtor-creditor relationship and not a trust, it is only one indicium and it too is not necessarily conclusive.

486 F.2d at 524 (citations omitted). The Bankruptcy Court specifically found "[r]efunds include interest from the date of collection at a rate based on the prime rate." 136 B.R. 930, 933. Under the reasoning of *Penn Central*, this accrument by TCo for the customers weighs against the existence of a trust relationship. *Accord* Restatement (Second) of Trusts § 12, Comment g. As to the second criterion, commingling, the Bankruptcy Court acknowledged the sharing of resources, yet rejected its significance in view of the inherent business impracticalities of maintaining separate accounts for a discrete refund. Although the Bankruptcy Court correctly emphasized *Penn Central*'s warning against the exclusive focus on the presence of commingling to defeat a trust, we find in viewing the entire relationship—the absence of intention to create a trust relationship, the unlimited use of the refunds, the payment of interest—that the added existence of commingling vitiates any proposed trust. *In re Martin,* 35 B.R. 982, 986 (Bankr. E.D. Pa. 1984).

The only remaining theory identified in support of the Customers' position is that a constructive trust should be imposed to prevent the unfair capture of funds in the bankruptcy estate where they clearly do not belong, a theory never expressly embraced by the Bankruptcy Court. Generally, the imposition of a constructive trust is warranted only where wrongful conduct or mutual mistake has occurred and caused unjust enrichment to the wrongdoer. The trust res must also be traceable to the debtor's assets. *In re Leedy Mortgage Co.,* 111 B.R. 488, 494 (Bankr. E.D.Pa. 1990); *Adams v. Jankouskas,* 452 A.2d 148, 152 (Del.Supr. 1982). As to a constructive trust, Delaware law applies because, as a remedy, the law of the forum state controls. *McMahon v. New Castle Assocs.,* 532 A.2d 601, 608-09 (Del. Ch. 1987); *In re Chanel Finan-*

cial, Inc., 102 B.R. 549, 550 (Bankr. N.D.Tex. 1988). The Customers argue that TCo's role in connection with the refunds was extremely limited and analogous to a conduit, wherein the refunds merely passed through as one step in their journey to the real owners, the customers. Since the refunds are federally imposed, the Customers contend, this conduit relationship is a necessary consequence of the regulatory scheme. To promote fairness to the public and preserve the objectives of just and reasonable rates, they urge for imposition of a constructive trust. In support, they rely on *In the Matter of United Milk Products,* 261 F.Supp. 766 (N.D. Ill. 1966); *In re Joliet-Will County Community Action Agency,* 847 F.2d 430 (7th Cir. 1988); and *Yonkers Board of Education v. Richmond Children's Center, Inc.*, 58 B.R. 980 (S.D.N.Y. 1986). Although initially appealing, none of these case authorities are unpersuasive.

In *United Milk, the* debtor, a manufacturer of milk products from milk supplied by producers, filed a Chapter 11 bankruptcy on May 20, 1965. On that date, the Department of Agriculture mailed a check for $9,172.19 to the debtor as partial payment "of the producer settlement fund credit that accrued for milk used by the debtor in its New York plant during the April 1965 delivery period." [11] 216 F.Supp. at 767. The settlement check was received postpetition and the debtor deposited the check into its own bankruptcy account. Before the court was whether the money that had been commingled with other funds of the debtor, as well as those credits awaiting distribution, were the property of the estate. The court found that the monies were not part of the debtor's estate, that the debtor "merely held them as a conduit, having an obligation to remit the same to the [unpaid] producers" whose milk gave rise to such credits. The court analogized the debtor

---

[11] Additional credits were also held by the Department of Agriculture, Market Administrator.

to a delivery agent, without right to the monies and viewed the entire transaction as a "continuing motion picture" and refused to stop at a "single frame" to decide the issue.

The Customers contend the relationship between the debtor and the refunds at bar is similar to that reviewed in *United Milk* and, therefore, the Court should focus on the entire transaction, the intent of the parties and the natural gas regulatory scheme. This complete picture, argue the Customers, reflects that refunds were held by TCo temporarily and should not be trapped within the estate merely because they were not flowed through before TCo entered bankruptcy. Also pertinent, argue the Customers, is that *United Milk* imposed a trust relationship despite the presence of a clear commingling of monies.

Superficially, *United Milk* resolves the questions against the Committee; however, a significant distinction precludes application. In *United Milk,* the government was directly involved, as the Department of Agriculture issued the check postpetition pursuant to a statutory scheme that mandated a uniform price for products. 7 U.S.C. § 608c (5)(c). In contrast, the dispute at issue is between private interests and their related private contracts. While the refunds are mandated by FERC, the internal accounting system implemented by TCo to manage monies is not. *See also In re Commodity Exchange Services Co.,* 62 B.R. 868 (N.D.Tex.), *aff'd* 67 B.R. 313 (N.D. Tex. 1986) (criticizes *United Milk*).

Likewise in *Joliet-Will,* 847 F.2d 430 (7th Cir. 1988), the government's stake in federal grant monies was significant. Debtor Joliet-Will was a "private nonprofit community service organization financed exclusively by federal and state grants." *Id.* at 431. Because all monies were either federal grant money or personal items bought by funding, federal agencies argued the assets belonged to them and should not be available to the creditors. The court agreed, reasoning that: 1) federal grants were

extremely particular with little discretion afforded the recipient; 2) the recipient was similar to an agent, charged with particular tasks, unlike a borrower or "entrepreneur using investment funds"; 3) "Congress is traditionally chary about giving agencies broad discretion with regard to expenditures or authorizing such agencies to delegate discretionary authority to private groups"; 4) precedent reflects federal funds held by a grantee generally remain federal property, until expended according to terms; and 5) "the treatment of such grants in other areas of law, notably criminal law, [indicate that] thefts of federal grant money (or personal property bought with such money) are treated as thefts from federal government, though for reasons of policy not obviously present here, primarily the lack of incentive of states to prosecute crimes in which the only victim is the federal government." *Id.* at 433.

The *Joliet-Will* considerations are not present at bar. First, the contracts do not contain specific language as to how refunds should be managed or used. Second, unlike an agent, TCo used the monies for its own purposes. Third, there are no comparable criminal penalties implicated by refusing to allow the refunds to pass to the customers. Finally, while the government in *Joliet-Will* had a direct interest in its funds, it lacks a similar interest in the customer refunds at bar.

In *Yonkers,* the court imposed a constructive trust where the governing bodies, the state and local school board, also had a direct interest in monies held by the debtor for students' education. 58 B.R. at 980, 982. The *Yonkers* monies originated from the state as part of a complicated payment and reimbursement scheme established for the education of the state's children. In imposing the trust, the court concluded the statutory scheme intended the monies, which had been commingled, for the sole benefit of the children, rather than the financial benefit of the debtor. We do not find *Yonkers* sufficiently compelling to impose a constructive trust. As noted, the

government lacks the intimate interest in the refunds at bar that was found in *Yonkers*. Furthermore, there is no similar paramount state interest herein.

Setting aside the conduit theory, a constructive trust is unwarranted as the record does not reflect wrongful conduct, mutual mistake or that unjust enrichment will result. Also, in view of the commingled funds, the res requirement for a constructive trust is absent. *In re Leedy Mortgage,* 111 B.R. 488, 494 (Bankr. E.D. Pa. 1990); *see, e.g., First Federal of Michigan v. Barrow,* 878 F.2d 912, 915-16 (6th Cir. 1989).

Having found no trust relationship, we find it is unnecessary to review the Bankruptcy Court's decision as to the amount to be disbursed consistent with its interpretation of the lowest intermedia balance test.

ISSUE TWO: UPSTREAM PIPELINE CHARGES

The Bankruptcy Court's findings of fact are not clearly erroneous as to this issue and reflect:

> TCo is itself a customer vis-a-vis its upstream gas suppliers. The rates it pays include upstream costs relating to transportation, the PGA, and Order No. 500 charges. Since April 1, 1991, TCo's costs relating to upstream pipeline transportation charges have been itemized separately in its tariff, in the Transporation Cost Recovery Adjustment ("TCRA") provision. TCo's TCRA costs are recovered on a dollar-for-dollar basis from its customers, and are also subject to refund. TCRA charges are separately accounted for in its gas rates through a tracking mechanism. As a result of the rate making process, TCo incorporates into the rates it charges its customers these three types of upstream charges.

136 B.R. at 940. TCo sought to pay prepetition charges billed by its upstream pipeline suppliers and transporters. The charges were fully recoverable by TCo from its cus-

tomers. *Id.* The Bankruptcy Court found that TCo "anticipates recovering these charges from its customers *after* making the upstream payments" and the upstream charges sought to be paid total about $16 mililon. *Id.* Although utilizing the same analysis applied to customer refunds based on federal common law, the Bankruptcy Court rejected the existence of a trust relationship after concluding that the payments were for goods and services TCo has received. Particularly important is the Bankruptcy Court's determination that the monies to be used to "pay upstream suppliers have *not* been collected from downstream customers." Instead "TCo proposes to recover these monies from its customers *in the future*" and, therefore, "the monies for upstream payments cannot be traced from any particular source." 136 B.R. at 930, 940 (emphasis in original).

Ozark Gas Transmission System maintains the Bankruptcy Court incorrectly differentiated between the trust funds related to downstream customers and those payments related to the upstream pipeline transporters. Ozark asserts the relationship between TCo and upstream suppliers is analogous to TCo's situation with its customers. According to Ozark, the Bankruptcy Court should have focused on the intent of TCo and the upstream pipeline transporters, the accounting system used by TCo, the relationships between the parties and the intricate regulatory scheme. These indicia, Ozark argues, establish a trust relationship under federal common law.

Meridian Oil argues the Bankruptcy Court incorrectly applied federal law to the upstream trust issue. Regardless of whether federal or state trust law principles apply, however, Meridian asserts the elements of a trust were never demonstrated.

For the reasons enumerated in Issue One, state trust law controls. Applying the trust factors to the record, we find no showing of a trust relationship. The absence of an ability to trace the monies which have not even been col-

lected from the downstream customers vitiates the purported trust. *See* 136 B.R. at 940.

ISSUE THREE: 11 U.S.C. §§ 105 & 1108

TCo contends the standard of review is *de novo* with respect to this third issue on appellate review because the Bankruptcy Court rendered ultimate facts that were based on an incorrect application of the law. Since the Third Circuit's pronouncement on ultimate facts, i.e., a mixture of fact and legal precedent, *Meridian v. Alten,* 958 F.2d at 1226, 1229 is in accord, to turn to the precise language of the Bankruptcy Court's decision:

> In connection with the customer refund aspect of its motion, TCo alleges that "failure by TCo to provide these refunds *could* severely jeopardize its relationships both with its customers and the FERC." These allegations were never proven. Indeed, in its post-hearing proposed findings of facts, TCo did not even suggest that these allegations had been proven. Moreover, these allegations are insufficient as a matter of law.
>
> * * * *
>
> [With regard to upstream payments TCo asserted:] The tariffs of these upstream pipelines all have provisions which allow [upstream pipeline sellers and transporters] to suspend or abandon service or terminate the contracts, under certain conditions, for non-payment of bills. The gas supply and transportation services of these pipelines are often necessary for TCo to meet its certified service obligations to its customers. . . . If such services were interrupted or abandoned, TCo would not be able to meet the requirements of its customers during peak winter periods, and, at minimum, would lose goodwill with its customers. . . . If these services are suspended, TCo may not be able to meet its purchase obligations to producers. TCo failed to prove these allegations.

136 B.R. at 940-941. Although the Bankruptcy Court's use of the phrase "insufficient as a matter of law" suggests legal and factual conclusions were intertwined, the court's specific finding of a record devoid of evidence to support the harm which TCo had prophesied is factual and independent of the ultimate facts described; therefore, the clearly erroneous standard applies. Because the Court finds the facts are not clearly erroneous, we turn to a plenary review of the law.

TCo argues the Bankruptcy Court's rejection of relief under 11 U.S.C. §§ 105,[12] and 1108 was erroneous because *Lehigh* was not the correct law to apply (C.A. No. 92-127-SLR D.I. 37); therefore, the case should be remanded for new findings of fact and application of the correct law. According to TCo, employing *Lehigh* for the necessity of payment test was incorrect as § 105 grants courts broad equitable powers to compel relief that is necessary and appropriate. *Voest-Alpine Trading USA v. Vantage Steel Corp.*, 919 F.2d 206, 215 (3d Cir. 1990). TCo also argues the goal of Chapter 11 is rehabilitation of the debtor and the court can accommodate this, largely without limitation, as long as the action pursued is consistent with the Chapter. *In re Adams*, 115 B.R. 59, 63 (Bank. D.N.J. 1990).

Alternatively, even under *Lehigh*, TCo argues it proved that the refusal to authorize the flowthrough and upstream charges would allow TCo to charge rates that are not just and reasonable and, therefore, in violation of FERC orders and the FERC tariff. This violation alone is sufficient proof of detrimental events that may only be avoided through utilization of § 105 powers. Al-

---

[12] The provision of 11 U.S.C. § 105 implicated provides in part: "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title." 11 U.S.C. § 1108 states: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business."

though TCo has invoked application of both sections, only § 105 grants the authority to compel the relief sought. According to the Third Circuit,

> Section 105(a) authorizes the bankruptcy court, or the district court sitting in bankruptcy, to fashion such orders as are required to further the substantive provisions of the Code. Section 105(a) gives the court general equitable powers, but only insofar as those powers are applied in a manner consistent with the Code. Nor does section 105(a) give the court the power to create substantive rights that would otherwise be unavailable under the Code.

In re Morristown & Erie R. Co., 885 F.2d 98, 100 (3d Cir. 1989) (citations omitted); *accord Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

In view of our conclusions outlined above, the relief sought is inappropriate under the Code. Accordingly, we need not reach whether application of *Lehigh* was correct.

CONCLUSION

For the reasons outlined above, the Bankruptcy Court's order of February 13, 1992 is reversed in part and affirmed in part.

An Order consistent with this Memorandum Opinion shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos. 91-803–91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-239-SLR

MERIDIAN OIL PRODUCTION, INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

ORDER

At Wilmington this 6th day of August, 1992;

IT IS ORDERED that the Opinion in the above cases, filed on July 6, 1992, be amended as follows:

1. Page 3, first line delete "not".

2. Page 3, first full paragraph, line 9 change "to" to "by".

3. Page 33, line 17 last line of the carryover paragraph, change "unpersuasive" to "persuasive".

4. Caption of C.A. No. 92-127-SLR is amended to include Columbia Gas Distribution Companies as an Appellee represented by John J. Dilenschneider, Esquire of Squire, Sanders & Dempsey, Columbus Ohio and Stephen

W. Spence of Phillips, Goldman & Spence, P.A., Wilmington, Delaware.

5. Caption of C.A. No. 92-237-SLR is amended to include Daniel F. Lindley, Esquire of Duane, Morris & Hecksher, Wilmington, Delaware and H. Rey Stroube, III, Esquire of Akin, Gump, Hauer & Feld, L.L.P., Houston, Texas as counsel for Energy Development Corporation.

/s/ Sue L. Robinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case Nos. 91-803–91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Civil Action No. 92-127-SLR

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-235-SLR

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellants,

v.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION,
Appellee.

Civil Action No. 92-236-SLR

OFFICIAL COMMITTEE OF CUSTOMERS,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-237-SLR

ENERGY DEVELOPMENT CORPORATION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-238-SLR

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC., NATURAL GAS, INC.,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-239-SLR

MERIDIAN OIL PRODUCTION INC.,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-240-SLR

OZARK GAS TRANSMISSION SYSTEM and
OZARK FINANCE CORPORATION,
Appellants,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-241-SLR

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-242-SLR

MARYLAND OFFICE OF PEOPLE'S COUNCIL,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

Civil Action No. 92-243-SLR

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellant,

v.

THE COLUMBIA GAS SYSTEM, INC. and
COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.

ORDER

At Wilmington this 6th day of July, 1992, consistent with the Memorandum Opinion issued this same date;

IT IS ORDERED that the Bankruptcy Court's order of February 13, 1992 is reversed in part and affirmed in part.

/s/ Sue L. Robinson
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
D. DELAWARE

IN THE MATTER OF THE COLUMBIA GAS SYSTEM, INC., and COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

Bankruptcy Nos. 91-803, 91-804

Feb. 13, 1992

MEMORANDUM OPINION AND ORDER

HELEN S. BALICK, Bankruptcy Judge.

On August 23, 1991 the Columbia Gas Transmission Company (ToC), a debtor-in-possession, moved this court for an omnibus order authorizing it to comply with its Federal Energy Regulatory Commission Gas Tariff and orders and regulations of the Federal Energy Regulatory Commission. Three related aspects dealt with payment of FERC-ordered refunds to TCo's customers, payment of surcharges to the Gas Research Institute, and payment of charges to upstream natural gas suppliers and transporters. In the context of TCo's Chapter 11 proceedings, these three aspects have become commonly known as the "FERC motion." An evidentiary hearing on the FERC motion was held on October 17, October 22, and November 27, 1991. The FERC motion was supported and opposed by many parties, and the Court has been flooded with briefing. The Court appreciates the efforts of the parties to coordi-

nate their posthearing briefing so as not to repeat argument.

The central dispute concerns whether certain monies TCo controls are property of the estate, and whether TCo may, consistent with the Bankruptcy Code, pay certain unsecured pre-petition obligations in advance of a confirmed plan of reorganization. This is the Court's opinion on this core proceeding. 28 U.S.C. § 157(b)(2)(A); § 157(b)(2)(M).

I. *Customer Refund and GRI Facts* [1]

TCo is an interstate transporter and seller of natural gas. It purchases gas from upstream pipeline suppliers and gas producers. TCo also transports gas from upstream suppliers to customers of the suppliers.

TCo sells gas to either local distribution companies or other transporters (customers). About 50% of its customers are affiliated with TCo or Columbia Gas Systems, Inc. None of these affiliates are in a Chapter 11 proceeding.

For each business relationship, TCo has executed a contract, relating to either the purchase, storage, transportation or sale of gas. Contract quantities are in units of decatherms (a measure of the amount of gas needed to produce a certain amount of heat). The rate TCo charges to each customer generally differs. TCo sells or transports about one billion decatherms of gas per year.

A. The Federal Regulatory Scheme

TCo's interstate gas operations are subject to the Natural Gas Act, 15 U.S.C. § 717 (1984). The NGA grants various powers to FERC, including the ability to set rates

---

[1] While some of the discussion herein is more legal than factual in nature, it provides necessary background for the motion and is more appropriately placed here.

and charges. 15 U.S.C. § 717c (1984). Subsection 717c(a) establishes a framework for FERC rate-making authority: "All rates and charges made, demanded, or received by any natural-gas company . . . shall be just and reasonable, and any rate or charge that is not just and reasonable is . . . unlawful."

FERC's general ratemaking procedure is set out in 18 C.F.R. Part 154 (1991). If FERC determines that a rate TCo is charging a customer is too low, FERC cannot retroactively increase the rate that TCo charges a customer. § 717d; *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Instead, FERC adjusts for the discrepancy on a dollar-for-dollar basis in prospectively setting TCo's rates. If FERC determines that a rate TCo is charging a customer is too high, FERC can order payment of refunds as well as adjust rates prospectively. A computation of the rates TCo charges its various customers along with copies of its service agreements comprises TCo's "tariff," a multi-volume book. The gas suppliers are also subject to FERC's rate-making authority and thus the rates *they* charge are subject to periodic review and modification. TCo's contracts with its downstream customers usually incorporate the applicable terms and conditions from its tariff.

TCO's gas rate for each customer consists of two components: the purchased gas adjustment (PGA) component and the general rate component. The PGA component reflects the cost of gas (price per decatherm times decatherms sold) TCo purchases from each supplier. TCo cannot predict its PGA costs. In order to track actual versus estimated PGA costs, FERC requires TCo to file estimated purchase costs every three months. The PGA filings are reconciled annually with TCo's actual purchase costs, and FERC adjusts TCo's PGA rates accordingly. TCo is not usually allowed to profit from the purchased gas component of its rates. While not required by the

NGA, the PGA method of tracking certain costs has been used extensively in the gas industry since 1972. *See generally* 18 C.F.R. §§ 154.301-310 (1991). The industry recognizes that this method allows TCo to "pass through" its PGA costs to its customers.

The general rate consists of TCo's internal non-gas costs, other charges, and a FERC-authorized rate of return (about 13% in the Fall of 1991) based upon the Federal Reserve prime rate. When TCo seeks to increase its general rate, it must file with FERC the proposed increase, with all accompanying data. Within 30 days, FERC must issue an order preliminarily allowing the new rate to go into effect, or suspending the effective date of the new rate filing up to five months.

If FERC allows the new filing to go into effect, it is "subject to refund." Subsequently, FERC conducts a due process hearing, reviews the filing, reconciles it with TCo's actual non-purchase costs, and determines whether TCo has under-recovered or over-recovered its costs for a given period of time. If FERC should subsequently determine that a rate contained in the filing is unjust, it can order TCo to refund the over-recovered amount as well as prospectively reduce the unjust rate. § 717c(e); § 717d; 18 C.F.R. Part 2 (1990). Refunds include interest from the date of collection at a rate based on the prime rate. 18 C.F.R. § 154.67(c)(2)(iii) (1991) (rolling average formula). This rate was 8.5% on October 22, 1991. Tariffs address the manner and timing of refunds.

B. The FERC-Ordered Customer Refunds

In the mid-1980's, an industry-wide problem occurred when a significant drop in the price of nautral gas caused a substantial number of contracts with above market prices between producers and pipelines to be uneconomical. FERC attempted to alleviate the financial detriment by allowing pipelines to buydown and buyout their contracts

with producers. In a buydown, a pipeline pays a producer money to reform the contract. In a buyout, the pipeline pays a producer to allow the pipeline to terminate the contract. In 1987, FERC promulgated Order No. 500. This order allowed pipelines upstream of TCo to recover, subject to refund, a portion of the cost associated with the buyouts and buydowns by passing through this portion to their downstream customers. Since 1987, pipelines have been passing through Order No. 500 costs to TCo, which in turn has been passing these costs to its customers.

The promulgation of Order No. 500 resulted in extensive litigation relating to its legality, and eventually FERC promulgated a subsequent order (No. 528) intended to correct defects found to exist in Order No. 500. A complete history of the litigation of FERC Order No. 500 is contained in *Associated Gas Distributors v. FERC,* 893 F.2d 349, *reh'g denied,* 898 F.2d 809 (D.C.Cir.1990), *cert. denied,* —— U.S. ——, 111 S.Ct. 277, 278, 112 L.Ed.2d 232, 233 (1990).

Order No. 528 contemplates that TCo's upstream pipelines will be allowed to pass through a much smaller portion of their buyout and buydown costs than allowed under Order No. 500. Thus Order No. 528 anticipates that TCo, and hence its customers, will receive thousands of distinct refunds. The refunds differ by sources of the overcharge, time period of the overcharge, and customer entitled to the refund. The proceedings determining the exact amount of the refunds are ongoing. No one disputes, however, that TCo, and hence its customers, will be entitled to Order No. 528 refunds totally approximately $134 million.

There are other FERC-ordered refunds that TCo wishes to honor. These refunds total about $26.5 million, for a grand total of $160 million that TCo seeks permission by its FERC motion to pass through to its customers. As of the date of its Chapter 11 filing, TCo had received but not

passed through about $21 million in FERC-ordered refunds. Post-petition, TCo expects to receive approximately an additional $140 million in refunds. TCo must pay interest to the customers on the refunds it has received at a FERC-prescribed rate. 15 U.S.C. § 717c(e); 18 C.F.R. § 154.67(c) (1991).

C. The Nature and Categories of the Refunds within the Context of these Proceedings

While it is not disputed that all the FERC-ordered refunds discussed here relate to pre-petition overcharges, the court observes that for the purposes of the FERC motion, the refunds divide into two analytical categories. First, there are those refunds for which a final FERC order exists and which TCo received pre-petition (the $21 million figure). Second, there are those refunds that TCo has received or will receive post-petition. The need for these two categories will become apparent in sections II.D-E.

D. TCo's Cash Management and Accounting Systems

TCo's financial accounting process is based on the Uniform System of Accounts promulgated by FERC at 18 C.F.R. § 201 Subchapter F. Accounting entries are made on a monthly basis. When TCo receives a refund, it treats the refund as an increase to its assets. TCo simultaneously creates a corresponding liability on its books reflecting its obligation to the corresponding customer. As long as the refund is passed through within eight and a half months of the year in which the refund was received, TCo need not pay income tax on the refund asset.

TCo tracks the various refunds it passes through using "accounting accounts." These accounts are not actual money accounts, but are mathematical and informational mechanisms for complying with the difficult task of sorting out its refund obligations. The accounting accounts thus segregate refunds by:

1. Source of refund;
2. Legal reason for the refund;
3. Time period in which the refund relates; and
4. Designated downstream recipient of the refund.

TCo maintains on the order of 100 accounting accounts.

TCo, however, does not maintain separate bank accounts for the different categories of refunds. It uses a combined cash management system. This system receives cash from many different sources, and uses the cash without restriction. The pooling of funds allows efficient utilization of cash resources and recognizes the impracticalities of maintaining separate cash accounts for the many different purposes that require cash.

TCo receives refunds from upstream suppliers and transporters of gas in the form of checks, wire transfers, and billing credits. TCo normally passes through refunds in the same manner. If the FERC motion is granted, TCo will pay a portion of the refunds out of cash funds, and a portion through "billing credits" imposed upon future billings to the customers for future gas sales.

Prior to the filing of its Chapter 11 petition, TCo's normal business practice was to minimize its cash balance. Every day the excess of deposits over disbursements was computed and either invested or used to pay down short-term debt with its parent, Columbia Gas Systems, Inc. On the day TCo filed its Chapter 11 petition, it had $3.3 million in cash.

E. Gas Research Institute Surcharges

The Gas Research Institute is a not-for-profit, tax-exempt research and scientific organization which funds research activities related to the natural gas industry. GRI does not provide any direct services to TCo. GRI derives a portion of its funding through surcharges that FERC

imposes upon the sale and transportation gas. FERC regulations and orders require TCo to collect these surcharges from its customers, and then to pay these amounts to GRI within 15 days. The surcharge, 1.42 cents per decatherm, is identified in TCo's tariffs, and TCo maintains separate accounting records for the received surcharges.

II. *Discussion of the Refund and GRI Surcharge Payment Motions*

TCo seeks authority to: "flow through to its customers refunds received by Transmission from its upstream pipeline suppliers relating to pre-petition overcharges in accordance with FERC orders and regulations and settlements approved by FERC." FERC motion, at 6. This motion refers to the $160 million TCo wishes to refund to downstream customers. Because of the inchoate status of the second category of refunds, TCo does not seek to pay out all $160 million at this time, but seeks permission to pay out all category one refunds, and the refunds in the second category it has received. With respect to the refunds in the second category that TCo receives in the future, TCo seeks in substance a declaratory judgment that these refunds may be paid out without further application to this Court.

Equality of distribution among claimants is a central policy of the Bankruptcy Code. Similarly situated claimants should receive pro rata shares of the debtor's property, and only in the context of a confirmed plan. *E.g., Goldberg v. New Jersey Lawyers' Fund,* 932 F.2d 273, 280 (3d Cir.1991). In light of these overriding principles, TCo offers two grounds to justify the customer refund and GRI surcharge payments.

The first ground is that the pre-petition amounts are not part of the estate, and that therefore, it does not need court authorization to disburse these monies. Property of the estate includes "all legal or equitable interests of the

debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). TCo controls the funds at issue and does not dispute that section 541(a)(1) applies to the funds it seeks to pay out.[3] Instead, it argues it holds the funds in trust for the customers and therefore has legal title, but no equitable interest in the funds. If so, then:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . , becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not the extent of any equitable interest in such property that the debtor does not hold.

§ 541(d). TCo concludes, and the objectors do not dispute, that if TCo holds the funds in trust, the funds are not property of the estate and TCo may, consistent with the Bankruptcy Code, make the requested payments. *See, e.g., Begier v. IRS,* 496 U.S. 53, ——, 110 S.Ct. 2258, 2263, 110 L.Ed.2d 46 (1990).

In determining the nature and extent of TCo's property interest in the funds, the first issue is to what body of law the court should look. TCo has not been helpful on this choice of law issue. During two stages of briefing on the issue, it waffled between whether state or federal common law applies. The Official Committee of Unsecured Creditors of TCo, which opposes the customer refund payments, argues that state law applies.

A. Whether the Monies TCo Proposes to use for Customer Refunds and GRI Payments are Property of TCo's Estate is a Question of Federal Law.

While generally state law determines property interests, *e.g., Jaffke v. Dunham,* 352 U.S. 280, 281, 77 S.Ct. 307,

---

[2] At one stage of the briefing of the FERC motion, TCo changed its position and suggested that perhaps it did not have even legal title to the funds. That position is without merit.

308-09, 1 L.Ed.2d 314 (1957) (per curiam), in specialized matters of essentially a federal character, federal common law applies. *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 67 S.Ct. 1604, 1608, 91 L.Ed. 2067 (1974) (restricting *Erie* doctrine). *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir.1981) has explored this doctrine in the context of the interstate railway system.

Lehigh dealt with a railroad in equity receivership that all parties treated as a reorganization/liquidation. *Id.* at 575. The railroad had ceased operations over two and one-half years prior to the receivership filing. *Id.* at 572 & n. 3. The District Court, sitting in diversity, held that interline claimants had a first priority in mortgaged assets to pay pre-receivership interline claims and thus had priority over the mortgage bondholder's secured claims in the assets.

On appeal the Court of Appeals explicitly addressed the same choice of law issue. Citing four factors, it declared that federal, not state law would apply. First, the funds in question arose out of railroad operations in interstate commerce. Second, Congress enacted the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* and the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.*, thus manifesting its intent to establish a national transportation policy. Third, Congress established the Interstate Commerce Commission to regulate interstate commerce by rail. Finally, the *Lehigh* court observed that uniformity in the balancing of interline freight accounts was required to allow the nation's railway system to operate properly as a single system. *Id.* at 575. Based upon these four factors, the *Lehigh* court concluded that the issue of the interline payments "implicate wholly national concerns and should be governed by federal law. *Id.* at 576.

These *Lehigh* factors dictate that federal common law should be used to analyze TCo's property interest in the funds it seeks to pay out. The funds in question arose

from TCo's interstate pipeline operations. Congress has enacted the Natural Gas Act to manifest its intent to establish a national policy concerning the transportation and sale of natural gas. Through the NGA, Congress established the Federal Energy Regulatory Commission to regulate these matters.

Finally, uniformity in the regulation of gas rates is important to the proper operation of the natural gas industry. Since the filing of its Chapter 11 petition, TCo has been unable to pay pre-petition customer refunds and GRI surcharges. The status of the refunds and GRI surcharges, as discussed in Section I.B. & E, *supra*, depends solely upon federal law relating to the NGA. Application of a particular state's law to resolve these payment issues would not further Congress' intent to promote a national scheme of "just and reasonable rate[s]". 15 U.S.C. § 717d (a). In short, the considerations that led the *Lehigh* court to apply federal common law of trusts apply with equal force here.

Contrary to the position of The Official Committee of Unsecured Creditors of TCo, *Federal Power Comm'n v. Interstate Gas Co.*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949) supports, and does not undermine this conclusion. In that case the Federal Power Commission (the predecessor of FERC) reduced the rates of an upstream pipeline which created a refund scenario. At issue was what body of law a federal court should apply in determining the competing rights of downstream pipelines and customers of those pipelines to the refunds. The United States Supreme Court did say that if local law provides a standard for determining competing refund rights, it should be applied. *Id.* at 583, 69 S.Ct. at 779. However, that was not the case there, nor is it the case here. Moreover, the Supreme Court observed that federal law determines the refund rights of downstream distribution companies that are subject to the Commission's jurisdiction. *Id.* at 580-81, 583, 69 S.Ct. at 778-79.

B. Refund Monies TCo Receives are Held in Trust.

The federal common law of whether a trust relationship exists is explained in *In re Penn Central Transportation Co.*, 486 F.2d 519 (3d Cir.1973), *cert. denied*, 415 U.S. 990, 94 S.Ct. 1588, 39 L.Ed.2d 826 (1974). *Penn Central* involved a railway reorganizing under section 77 of the Bankruptcy Act. The national railway system at that time consisted of numerous railways that provided transportation for goods from the point of origin to destination. A shipper's railroad car traveled over the lines of many different railroads, and was used by each of them before it returned to the possession of the owning railroad. The railroads created a system of accounting and periodic settlement of accounts to facilitate this manner of operation. The accounting for various rail services rendered to the public and other railroads resulted in "interline accounts," and the settlement of accounts resulted in "interline balances." 486 F.2d at 521.

An interline carrier moved for an order requiring the railway to pay pre-petition interline accounts and balances. The *Penn Central* court considered the nature of the interline accounting system in ruling whether payment of such pre-petition amounts would be allowed. It observed that the interline accounting system was essentially a system:

> [B]y which one railroad collects monies owed by shippers to both itself and other railroads. The monies collected belong only in part to the collecting railroad; as to monies owed other railroads, the collecting railroad serves merely as a receiving and transmitting agent.

Id. at 523-24.

The court saw the key question as whether the funds were intended to be held in trust, without reference to state law. Two factors relating to this were whether the collecting agent paid interest on monies held, and whether

the monies were commingled with the general funds. In the *Penn Central* case, the absence of interest suggested a trust, while the existence of commingling suggested a debtor-creditor relationship. *Id.* at 524. The court observed that commingling has minimal significance in the extraordinary operations of interline railroads because normal operations preclude as a practical and economic matter any effective daily segregation. *Id.* at 525. It concluded, that as to freight and passenger accounts, the funds were held in trust. *Id.* at 525-527.

A second group of interline accounts at issue in *Penn Central* related to train car repair, per diem rental, and switching charge accounts. The court reasoned that these "accounts do not involve collection of money by one carrier for another. These accounts merely represent the performance of services by one railroad." *Id.* at 528. The court concluded the amounts due on these accounts were not held in trust.

The last type of interline account analyzed was the overcharge and loss and damage (overcharge) account. When a shipper discovered that the railroads overcharged him, or that he was due payments for loss of, or damage to goods shipped, he made a claim to any carrier which participated in the shipment. The carrier which paid the claim could then draw upon a draft on the responsible carrier within the same month. *Id.* at 527-28.

The *Penn Central* court found the overcharge account the most difficult to analyze conceptually. While recognizing that this account possessed some indicia of a trust fund, *Id.* at 528-29, it held that the overcharge account was not held in trust for the following reasons. First, the Interlines had argued that the overcharge amounts must be paid immediately to comply with specific statutory requirements. The court found no such requirements to exist. Instead, the payment scheme resulted from a voluntary set of rules the Association of American Railroads promulgated. Second, when the debtor railway received

the freight payment, "it had *no notice that at a later date part of those sums would have to be returned.*" *Id.* at 528-29 (emphasis added).

TCo has satisfied the *Penn Central* standards for proving the refunds are held in trust when received. Commingling of the actual funds, as in *Penn Central,* has minimal significance here due to the nature of TCo's business and the impracticalities and administrative burdens of maintaining actual separate accounts for each type of refund. In contrast with the car repair, rental and switching accounts in *Penn Central,* the refunds do not equate with the unpaid performance of goods or services. The refund procedure *does* involve the collection of money by one entity for another.

Finally, the refunds starkly contrast with the overcharge accounts at issue in *Penn Central.* Here, the payment procedures are not voluntary, but are mandated by federal law. More importantly, because all rates are approved "subject to refund," TCo *is* on notice that at a later date, a portion of the monies it receives may have to be disgorged.

C. GRI Monies TCo Received were Held in Trust.

TCo seeks authority to: "pay pre-Petition charges to FERC and the Gas Research Institute, which charges are fully recoverable by Transmission from its customers under separately identifiable surcharges in its Tariff." FERC motion, at 5. At issue here is approximately $1.8 million TCo has collected from its sales and transportation customers for the months June and July 1991. All monies collected before this time were paid to GRI prior to TCo's Chapter 11 filing. All monies collected post-petition TCo has paid or will pay on a month to month basis. 11 U.S.C. § 365(d)(3).

After considering the same factors discussed in connection with the refunds, the court finds TCo has satisfied its burden that GRI surcharges when received are

held in trust. These surcharges involve the collection of money by TCo from its customers for a third party. The customers are not paying TCo for goods or services. Finally, the GRI surcharge is separately identified in TCo's tariff.

D. TCo's Ability to Pay Surcharges to the GRI and Category One Refunds to its Customers is Limited by the Lowest Intermediate Balance Rule.

Application of *Penn Central,* however, does not end the analysis of the FERC motion. In *Penn Central,* there were always sufficient general funds to pay the trust claims and therefore that court's finding of a trust fund was sufficient to allow the freight and passenger interline payments. Here, however, as will be discussed, sufficient funds to pay the trust claims do *not* always exist. Therefore, the court's finding of a trust relationship between TCo and its customers and the GRI is *not* sufficient to allow the refund and GRI payments. The *Lehigh* case conveniently provides the additional federal common law of trusts necessary to resolve the issues the FERC motion raises.

In *Lehigh,* the mortgage bondholder (Central Jersey Industries) had objected to the proposed payment of the interline claims and had proved that there had been a complete dissipation of funds with which the trust funds were commingled. Therefore, the *Lehigh* court found that the "dissipation of trust" rule applied:

> "The basic idea of the trust doctrine as applied in bankruptcy is a fair and reasonable identification of the property or fund so as not to harm other creditors. . . . [T]he claimant must assume the burden of ascertaining and tracing the trust property. . . .'

Id. at 579 (quoting *Sonnenschein v. Reliance Ins. Co.,* 353 F.2d 935, 936-37 (2d Cir.1965)).[3] The court also

[3] TCo's suggestion that this Court's decision in *In re Delaware & Hudson Ry. Co.,* 127 B.R. 756 (Bankr.D.Del.1991) released this tracing requirement is without merit.

found that this rationale applied to secured as well as unsecured creditors. Since the *res* of the mortgaged assets could neither be identified with nor traced to interline payments, the *res* was not held in trust.

The dissipation of trust rule accords with federal common law in other Circuits and as originally established by the United States Supreme Court. As the First Circuit Court of Appeals recently stated:

> The normal rule for construing trust proceeds commingled in a bank account is known as the 'lowest intermediate balance test.' Under that test, set down by the Supreme Court in *Schuyler v. Littlefield,* 232 U.S. 707 [34 S.Ct. 466, 58 L.Ed. 806] (1914), and *Cunningham v. Brown,* 265 U.S. 1 [44 S.Ct. 424, 68 L.Ed. 873] (1924), a court will [allow trust proceeds to be paid] where the amount on deposit has at all times since the commingling of the funds equaled or exceeded the amount of the trust fund. Where, however, after the commingling, all the money is withdrawn, the trust fund is treated as lost, even though later deposits are made into the account. Should the amount on deposit be reduced below the amount of the trust fund but not depleted, the claimant is entitled to the *lowest intermediate balances* in the account.

Conn. Gen. Life Ins. v. Universal Ins. Co., 838 F.2d 612, 619 (1st Cir.1988) (other citations omitted) (emphasis added). *See generally* 4 *Collier on Bankruptcy* ¶ 541.13, at 541-79 (1991); V A.W. Scott & W.F. Fratcher, The Law of Trusts, § 518, at 634-636 (4th ed. 1989).

TCo has more than met its burden of fairly and reasonably identifying the refund obligations it wishes to honor. TCo initially identifies the refund obligation when it receives a FERC-ordered payment from upstream. TCo continues to fairly and reasonably track each obligation as it arises through TCo's 100 accounting accounts,

which provide detailed information available about each refund. TCo will employ the same practices for refunds it receives in the future.

In reference to the motion to pay GRI surcharges and the first category of customer refunds, however, TCo has only partially satisfied its burden of tracing the property it seeks to use to make the payments. TCo has identified monies as trust funds only to the extent of its lowest intermediate cash balance. On July 31, 1991, the date it filed its Chapter 11 petition, TCo had only $3.3 million in cash. This figure presents the lowest intermediate balance, and reduces TCo's ability to pay refunds received as of that date (which totalled about $21 million) and GRI surcharges (about $1.8 million) to that amount. Therefore, TCo may pay these obligations only on a *pro rata* basis in an amount not exceeding $3.3 million.

E. TCo May Pay Category Two Refunds.

As for the second category of refunds, the objectors neither argued nor presented evidence, as Central Jersey did in *Lehigh,* that the lowest intermediate balance rule operates to deny any or all of the relief TCo requests. That is, no evidence exists that post-petition, TCo's refund obligations were or will be less than its cash balance. Quite the contrary, TCo proved it received $100 million in September, had $172 million in liquid funds at the end of September, and that its cash balance has only increased since then. TCo also presented explicit evidence that its cash balance is sufficient to pay its present and future refund obligations. This record is sufficient to prove that post-petition, there is no reason to limit TCo's ability to pay refunds.

F. The "Necessity of Payment" Doctrine is Not Applicable.

1. *Customer Refunds*

Because sections II.D-E. grant the refund and GRI aspects of TCo's FERC motion only in part, it is necessary to address TCo's second ground for its FERC motion. This ground relies upon sections 105 and 1108 of Title 11. Section 105(a) in relevant part states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 1108 states: "Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." In this Chapter 11 proceeding, no trustee has been appointed, and TCo is in possession of its own business. Reading sections 105(a) and 1108 together then, TCo's contention is that the payments are necessary or appropriate for TCo to operate its business and to aid its reorganization. This begs the question of the appropriate standard for allowing payment of a pre-petition obligation where the monies for the payment are property of the estate.

T*he Lehigh* court was faced with the same question in the context of whether interline creditors could be paid out of the corpus of mortgaged property. 657 F.2d 570, 581. The court reiterated the "necessity of payment" doctrine that applies in the Third Circuit. If payment of a pre-petition claim "is essential to the continued operation of [debtor], payment may be authorized." *Id.* While the *Lehigh* court further detailed this standard, it is not necessary to do so here.

In connection with the customer refund aspect of its motion, TCo alleges that "failure by TCo to provide these refunds to its customers *could* severely jeopardize its relationships both with its customers and the FERC." FERC motion, at 18 (emphasis added). These allegations

were never proven. Indeed, in its post-hearing proposed findings of facts, TCo did not even suggest that these allegations had been proven. Moreover, these allegations are insufficient as a matter of law.

2. *GRI Surcharges*

While TCo has asserted that the necessity doctrine applied to the GRI aspect of its FERC motion, no evidence was presented that supports this ground.

III. *TCo May Not Pay Upstream Pipeline Charges*

A. Upstream Pipeline Facts

TCo is itself a customer vis-a-vis its upstream gas suppliers. The rates it pays include upstream cost relating to transportation, the PGA, and Order No. 500 charges. Since April 1, 1991, TCo's costs relating to upstream pipeline transportation charges have been itemized separately its its tariff, in the Transportation Cost Recovery Adjustment provision. TCo's TCRA costs are recovered on a dollar-for-dollar basis from its customers, and are also subject to refund. TCRA charges are separately accounted for in its gas rates through a tracking mechanism. As a result of the rate making process, TCo incorporates into the rates it charges its customers these three types of upstream charges.

B. Discussion of the Upstream Payment Motion

TCo's FERC motion seeks authority to:

> [P]ay pre-petition charges billed to Transmission by its upstream pipeline suppliers and transporters (including affiliates) under their FERC Tariffs and Orders for services which are necessary to meet Transmission's delivery obligations, which charges are fully recoverable by Transmission from its customers.

FERC motion, at 5. The last clause of this request refers to the fact that the charges TCo seeks to pay upstream are already fully incorporated into the rates it charges its customers. TCo's motion and briefing admits that TCo anticipates recovering these charges from its customers *after* making the upstream payments. TCo does not seek authority to pay pre-petition charges of the type described in its motion that are not recoverable from its customers. The upstream charges TCo seeks to pay total about $16 million.

TCo asserts the same two legal grounds previously discussed allow it to make the upstream payments.

1. *Monies for Upstream Payments Are Property of the Estate.*

Applying that law as set forth in *Penn Central* and *Lehigh* to the upstream payment motion, the Court finds that the upstream facts are entirely different from those pertaining to the customer refunds and the GRI surcharges. First, the upstream payments *are* for goods and services TCo has received.

More significant is the chronological aspect of the proposed upstream payments. The monies it would use to pay upstream suppliers have *not* been collected from downstream customers. On the contrary, TCo proposes to recover these monies from its customers *in the future*. This proposed payment timeline also means that the monies for upstream payments cannot be traced from any particular source. In short, there is no trust fund here.

2. *The Upstream Payments Are Not Necessary.*

TCo's second ground is that the doctrine of necessity applies to the upstream payments. TCo alleges that:

> The tariffs of these upstream pipelines all have provisions which allow [upstream pipeline sellers and transporters] to suspend or abandon service or to terminate the contracts, under certain conditions, for non-payment of bills. The gas supply and transporta-

> tion services of these pipelines are often necessary for TCo to meet its certificated service obligations to its customers. . . . If such services were interrupted or abandoned, TCo would not be able to meet the requirements of its customers during peak winter periods, and, at a minimum, would lose goodwill with its customers. . . . If these services are suspended, TCo may not be able to meet its purchase obligations to producers.

FERC motion, at 11-12. TCo failed to prove these allegations.

Various other arguments have been raised in support of the FERC motion. The court has considered each, and holds each to be without merit. In particular, to the extent the supporters argue TCo holds monies in a "statutory trust," that notion is rejected. *Begier v. IRS*, 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1991).

IV. *Conclusion*

TCo's motions to pay pre-petition customer refunds and GRI surcharges are GRANTED to the extent stated herein. TCo's motion to pay pre-petition upstream charges is DENIED. An order in accordance with this opinion is attached.

ORDER

AND NOW, February 13, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. TCo may pay category one refunds and pre-petition GRI surcharges on a pro-rata basis only to the extent of $3.3 million. TCo's motion to pay category one refunds and GRI surcharges is otherwise DENIED.
2. TCo's motion to pay category two refunds is GRANTED.
3. TCo's motion to pay pre-petition upstream pipeline charges is DENIED.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Case No. 91-803
Case No. 91-804

IN THE MATTER OF THE COLUMBIA GAS SYSTEM, INC.,
and COLUMBIA GAS TRANSMISSION CORPORATION,
Debtors.

ORDER

AND NOW, February 13, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. TCo may pay category one refunds and pre-petition GRI surcharges on a pro-rata basis only to the extent of $3.3 million. TCo's motion to pay category one refunds and GRI surcharges is otherwise DENIED.

2. TCo's motion to pay category two refunds is GRANTED.

3. TCo's motion to pay pre-petition upstream pipeline charges is DENIED.

/s/ Helen S. Balick
Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7395, 92-7396, 92-7397, 92-7398, 92-7399
92-7400, 92-7410, 92-7411, 92-7412, 92-7413, 92-7414
92-7415, 92-7435, 92-7436, 92-7499, 92-7500

IN RE: COLUMBIA GAS SYSTEMS INC.,
COLUMBIA GAS TRANSMISSION CORPORATION

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION,
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP ("the Partnership")
AND ITS SUBSIDIARY, OZARK FINANCE CORPORATION
(the "Company"),
Intervenors in support of Appellants

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and
COLUMBIA GAS TRANSMISSION CORPORATION
("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7395

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS SYSTEMS INC.

v.

UNSECURED CREDITORS COMMITTEE
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEMS, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7396

(D.C. Civil No. 92-00235)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.

THOMAS E. ROSS,
Trustee

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE");
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS SYSTEM, INC. ("CG") and COLUMBIA GAS TRANSMISSION CORPORATION ("TCO" and together with CG, "the Debtors"),
Appellants No. 92-7397

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Courts 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
The PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7398

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
MARYLAND OFFICE/PEOPLE'S COUNSEL

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTIONS INC.,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATURAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of
Official Committee of Customers
of the Columbia Gas
Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS TRANSMISSION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
the MARYLAND PUBLIC SERVICE COMMISSION,
the PUBLIC UTILITIES COMMISSION OF OHIO and the
MARYLAND OFFCE OF PEOPLE'S COUNSEL,
Appellants No. 92-7399

(D.C. Civil No. 92-00242)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
PUBLIC UTILITIES COMMISSION/OHIO

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION

THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC.,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF KENTUCKY,
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION, the MARYLAND PUBLIC SERVICE COMMISSION, the PUBLIC UTILITIES COMMISSION OF OHIO and the MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Appellants No. 92-7400

(D.C. Civil No. 92-00243)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC
SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE NATURAL GAS COMPANY
("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenors in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

WEST OHIO GAS COMPANY,
THE PEOPLES NATURAL GAS COMPANY and
VIRGINIA NATURAL GAS, INC.,
Appellants No. 92-7410

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
WEST OHIO GAS CO.;
VIRGINIA NATURAL GAS, INC.;
PEOPLES NATURAL GAS COMPANY,
Appellants No. 92-7411

(D.C. Civil No. 92-00238)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION ("TCo"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF THE COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7412

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
OFFICIAL COMMITTEE/CUSTOMERS

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of
Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE ON UNSECURED CREDITORS OF
COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA"); THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellant
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenor in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF THE COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Appellant No. 92-7413

(D.C. Civil No. 92-00236)

IN RE: COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF THE COLUMBIA GAS TRANSMISSION CORPORATION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

TENNESSEE GAS PIPELINE COMPANY,
Intervenor-defendant

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNCIL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the "Company"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCO"),
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Intervenors in support of
Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
MARYLAND PUBLIC SERVICE COMMISSION;
PUBLIC UTILITIES COMMISSION OF OHIO;
Intervenors in support of
Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA,
Intervenor in support of
Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL,
STATE OF OHIO (OCC),
Intervenor in support of
Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

COLUMBIA GAS OF KENTUCKY,
COLUMBIA GAS OF MARYLAND,
COLUMBIA GAS OF OHIO,
COLUMBIA GAS OF PENNSYLVANIA, AND
COMMONWEALTH GAS SERVICES, collectively
known as the COLUMBIA GAS DISTRIBUTION COMPANIES,
Appellants No. 92-7414

(D.C. Civil No. 92-00127)

IN RE: COLUMBIA GAS SYSTEMS INC.;
PENNSYLVANIA PUBLIC UTILIY COMMISSION

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANSMISSION CORPORATION;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MARYLAND OFFICE OF PEOPLE'S COUNSEL ("MPC"),
Intervenor in support of Appellants
(per Court's 9/11/92 order)

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Intervenor in support of Appellees
(per Court's 9/11/92 order)

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

ORANGE AND ROCKLAND UTILITIES, INC.;
CENTRAL HUDSON GAS AND ELECTRIC CORPORATION;
NEW YORK STATE ELECTRIC AND GAS CORPORATION;
NATIONAL FUEL GAS SUPPLY CORPORATION,
Intervenors in support of Official Committee of Customers of the Columbia Gas Transmission Corporation
(per Court's 9/11/92 order)

COLUMBIA GAS DISTRIBUTION COMPANIES,
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OZARK GAS TRANSMISSION SYSTEM,
A TEXAS GENERAL PARTNERSHIP (the "Partnership")
AND ITS SUBSIDIARY,
OZARK FINANCE CORPORATION (the Company"),
Intervenors in support of Appellants
(per Court's 9/21/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 9/21/92 order)

PENNSYLVANIA PUBLIC UTILITY COMMISSION; MARYLAND PUBLIC SERVICE COMMISSION; PUBLIC UTILITIES COMMISSION OF OHIO,
Intervenors in support of Appellants
(per Court's 9/25/92 order)

CONSUMER ADVOCATE DIVISION OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Intervenor in support of Appellants
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA"); THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA (OPC),
Intervenors in support of Appellants
(per Court's 10/15/92 order)

OFFICE OF THE CONSUMERS' COUNSEL, STATE OF OHIO (OCC),
Intervenors in support of Appellees
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Appellants No. 92-7415

(D.C. Civil No. 92-00241)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS INC.;
COLUMBIA GAS TRANS.,
THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE
(Pa. OCA),
Intervenor in support of
Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of
Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS ("Customer Committee") OF COLUMBIA GAS TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

OZARK GAS TRANSMISSION SYSTEM AND OZARK FINANCE CORPORATION,
Appellants No. 92-7435

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.; OZARK GAS TRANSMISSION SYSTEM; OZARK FINANCE CORP.,
Appellants No. 92-7436

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.; COLUMBIA GAS TRANS.; THOMAS E. ROSS,
Trustee

PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE (Pa. OCA),
Intervenor in support of Appellees
(per Court's 9/11/92 order)

MERIDIAN OIL PRODUCTION INC. ("Meridian Oil"),
Intervenor in support of Appellees
(per Court's 9/25/92 order)

DELMARVA POWER & LIGHT COMPANY ("DELMARVA");
THE PROVIDENCE GAS COMPANY ("PROVIDENCE"),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICE OF THE PEOPLE'S COUNSEL FOR THE
DISTRICT OF COLUMBIA (OPC),
Intervenors in support of
Appellants
(per Court's 10/15/92 order)

OFFICIAL COMMITTEE OF CUSTOMERS
("Customer Committee") OF COLUMBIA GAS
TRANSMISSION CORPORATION ("TCo"),
Intervenor in support of
Appellants
(per Court's 10/15/92 order)

GAS RESEARCH INSTITUTE ("GRI"),
Amicus Curiae
(per Court's 10/23/92 order)

IN RE: COLUMBIA GAS SYSTEMS INC.;
MERIDIAN OIL PRODUCTION INC.

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS;
THOMAS E. ROSS,
Trustee

OZARK GAS TRANSMISSION SYSTEM AND
OZARK FINANCE CORPORATION,
Appellants No. 92-7499

OZARK GAS TRANSMISSION SYSTEM; OZARK FIN. CORP.,
Appellants No. 92-7499

(D.C. Civil No. 92-00239)

IN RE: COLUMBIA GAS SYSTEMS, INC.;
OZARK GAS TRANSMISSION SYSTEM;
OZARK FINANCE CORP.,
Appellants No. 92-7500

(D.C. Civil No. 92-00240)

v.

COLUMBIA GAS SYSTEMS, INC.;
COLUMBIA GAS TRANS.;
THOMAS E. ROSS,
Trustee

MERIDIAN OIL PRODUCTION, INC.
Intervenor-Appellee
(per Court order dated
11/6/92)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*; BECKER, SCIRICA, COWEN, NYGAARD and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellee the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker would have granted rehearing in banc as would Judge Nygaard for the reasons set forth in his dissenting opinion.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: Aug. 06, 1993

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Case Nos. 91-803 and 91-804

IN RE: THE COLUMBIA GAS SYSTEM, INC., and
COLUMBIA GAS TRANSMISSION, CORPORATION,
Debtors.

OBJECTION OF THE UNITED STATES OF AMERICA TO MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION FOR AN ORDER APPROVING A SETTLEMENT OF ITS 1990 RATE CASE BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION AND AUTHORIZING PAYMENT OF SETTLEMENT AMOUNT

The United States of America, by and through undersigned counsel, hereby objects to the Motion of Columbia Gas Transmission Corporation ("TCo") for an Order Approving a Settlement of its 1990 Rate Case Before the Federal Energy Regulatory Commission and Authorizing Payment of Settlement Amount ("Motion").

STATEMENT

TCO seeks an order of this Court approving a settlement of its 1990 rate case before the Federal Energy Regulatory Commission ("FERC") FERC Docket no. RP90-108-000. Among other things the settlement "(i) establishes TCO's . . . costs of service and throughput for the period from November 1, 1990 through November 30, 1991; (ii) sets forth the rates TCO . . . may charge [its] customers for the period from November 1, 1990 through November 30, 1991; (iii) provides that, subject to any necessary Bankruptcy Court approval, TCO . . . [is] to pay $58.5 million . . . in refunds (principal) to their

customers, plus interest at FERC-Established rates; . . ." Motion at pp. 2-3.

ARGUMENT

The United States of America has no objection to the parties to the FERC case entering into a settlement: establishing TCO's costs of service and throughput for the period from November 1, 1990 through November 30, 1991 and establishing the rates TCO may charge its customers for the same period. Nor does the United States object to the fixing of the amount of the refund *claims* of the customers at $58.5 million, plus pre-petition interest at FERC-established rates. Furthermore, the United States does not contest TCO's entitlement to pay that portion of the customer refunds attributable to TCO's *post-petition* rate collections, as an expense of administration of TCO's estate.[1]

The United States does object to the settlement to the extent that it requires TCO to pay that portion of customer refunds attributable to TCO's *pre-petition* rate collections. For the reasons set forth in the Opposition of the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation to the Motion of Columbia Gas Transmission Corporation for an Order Approving a Settlement of its 1990 Rate Case Before the Federal Energy Regulatory Commission and Authorizing Payment of Settlement Amount, which is incorporated herein by reference, the United States respectfully requests that the Court deny TCO's Motion to the extent it seeks authority to pay customer refunds attributable to *pre-petition* rate collections, and submits that the customers be treated as having general unsecured claims for these pre-petition amounts, and dealt with as all other

[1] As TCO concedes in its Motion the settlement involves payment of refunds to customers for both pre- and post- petition periods encompassing the period November 1, 1990 through November 30, 1991. This time frame includes approximately nine pre-petition months and four post-petition months. *See*, Motion at 14 ¶ 17.

general unsecured claimants under TCO's forthcoming plan of reorganization.

Dated: June 10, 1993.

Respectfully submitted,

WILLIAM C. CARPENTER, JR.
United States Attorney

ELLEN SLIGHTS
Assistant U.S. Attorney

/s/ Karl J. Fingerhood
KARL J. FINGERHOOD
STUART D. GIBSON
Trial Attorneys, Tax Div.
U.S. Dept. of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-0855
(202) 307-6586

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing OBJECTION OF THE UNITED STATES OF AMERICA TO MOTION OF COLUMBIA GAS TRANSMISSION CORPORATION FOR AN ORDER APPROVING A SETTLEMENT OF ITS 1990 RATE CASE BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION AND AUTHORIZING PAYMENT OF SETTLEMENT AMOUNT upon interested parties to this proceeding on the 10th day of JUNE, 1993, by causing true and correct copies thereof to be placed in the United States mail, postage prepaid, to those persons on the attached sheets.

/s/ Karl J. Fingerhood
KARL J. FINGERHOOD